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# "Ethnic Cleansing" in the Balkans: The Legal Foundations of Foreign Intervention

David M. Kresock\*

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## Introduction

As Eastern European nations shed the burdens of a forced communist culture, seeking to create their own social and political milieu, the international community<sup>1</sup> must re-evaluate its approach to the sovereignty<sup>2</sup> of individual states. To ensure that the international community can meet the sometimes conflicting goals of assuring fundamental human rights and political sovereignty, the international policies of both humanitarian intervention and national self-determination must be harmonized. Without a coherent policy that permits states to actively protect human rights, the international community leaves ethnic minorities, and others, exposed to threats of abuse and mistreatment so long as the abusive nation does not move the conflict into the international arena. The current situation in the Balkans serves as an example of the international community's inadequate ability to protect human rights and preserve state sovereignty under current international law.

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1. As used in this Note, the term "international community" refers to that collective body of states (i.e., the United States of America, Russia, etc.) and organizations of states (i.e., United Nations, North Atlantic Treaty Organization, Organization of American States, etc.) that recognize principles of law that govern international relations.

2. While the term "sovereignty" does not easily lend itself to a single denotation, I here refer to the contemporary principle of sovereignty defined as "the basic international legal status of a State that is not subject, within its territorial jurisdiction, to the governmental, executive, legislative, or judicial jurisdiction of a foreign State or to foreign law other than public international law." 10 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 408 (1987). Contemporary international law views state "sovereignty" as a means to protect the right of self-determination. *Id.* at 410. In addition, this theory of "sovereignty" necessarily presupposes that all states are subject to "sovereign equality" and "hold principally all rights and obligations possible under general international law, notwithstanding differences of a political, military, cultural, socio-economic or other nature." *Id.* at 411. The principle of non-intervention serves as the primary means by which the international community protects state sovereignty and sovereign equality. *Id.*

In its most ideal form, "international law"<sup>3</sup> would allow third-party states, or organizations of states, to intervene in conflicts traditionally considered within a state's "domestic" jurisdiction when that state refuses, or is unable, to institute measures to preserve fundamental human rights. To accomplish this, the traditional framework of international law must evolve to accommodate our present understandings and conceptions of both "international" and "domestic" concerns. Several factors that plague the current structure of public international law will mitigate against fears that this limited "right" of intervention will be subject to abuse.

Part I of this Note describes how the traditional policies of international law and the United Nations (U.N.) relate to the doctrines of self-determination, non-intervention, and humanitarian intervention. Part II relates the background of the current conflict in the Balkans by describing how ancient ethnic animosities, inflamed by modern political movements, have exploded into the current civil war and the practice of "ethnic cleansing."<sup>4</sup> Part III suggests that the established legal structure has failed to provide an adequate solution to the massive human rights violations resulting from the dissolution of the former Yugoslavia. Part IV attempts to identify possible alternatives to the present legal structure that would preserve the fundamental right of state sovereignty, but also guarantee the basic human rights that the international community must seek to protect.

## I. Traditional Policies of International Law and the United Nations

### A. The Right of Self-Determination

#### 1. *Origin of the Doctrine*

The concept of "self-determination" evades an easy definition.<sup>5</sup> Because of its firm basis in liberal political philosophy, many view the principle of self-determination as "*the* pre-emptory norm of international law."<sup>6</sup> At the core of self-determination lies the notion that outside parties should not interfere in individuals' attempts to shape their political regime.<sup>7</sup>

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3. "International Law" refers to "[t]hose laws governing the legal relations between nations," as well as "rules and principles . . . dealing with the conduct of nations and of international organizations." BLACK'S LAW DICTIONARY 816 (6th ed. 1990). See also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 101, 102 cmt. b (1987). Nations generally consider international customs, treaties, and derivatives of general principles common to major legal systems of the world as the most important sources of international law. See generally *id.* at §§ 101-03.

4. "Ethnic cleansing" refers to the systematic removal of the members of one ethnic group by the members of another in an attempt to "purify" geographical regions. Russell Watson et al., *Ethnic Cleansing*, NEWSWEEK, Aug. 17, 1992, at 16; J.F.O. McAllister, *Atrocity and Outrage*, TIME, Aug. 17, 1992, at 23. See *infra* part II.C.

5. See, e.g., Deborah Z. Cass, *Re-Thinking Self-Determination: A Critical Analysis of Current International Law Theories*, 18 SYRACUSE J. INT'L L. & COM. 21, 21-22 (1992) ("Current international law theory regarding self-determination is in a state of uncertainty and confusion. It is inconsistent within itself, and it does not accord with state practice.").

6. MICHA POMERANCE, SELF-DETERMINATION IN LAW AND PRACTICE 1 (1982) (emphasis in original).

7. Jost Delbrück, *A Fresh Look at Humanitarian Intervention Under the Authority of the United Nations*, 67 IND. L.J. 887, 889 (1992).

Some scholars trace the theoretical genesis of self-determination to the American and French Revolutions.<sup>8</sup> The concept first emerged as an explicit principle of international law soon after World War I when the League of Nations attempted to address the needs of the Central Powers' former colonies.<sup>9</sup> To free themselves of the financial burdens associated with imperialism, the Allies formally established the doctrine of self-determination as a means to lead the former colonies to self-rule.<sup>10</sup>

The right of self-determination held much greater significance after World War II. Seeking to promote international stability, the founders of the United Nations listed the "self-determination of peoples" as one of the organization's primary goals.<sup>11</sup> Further, the United Nations relied upon the doctrine of self-determination to justify decolonization and the creation of the International Trusteeship System.<sup>12</sup> Finally, the U.N. General Assembly<sup>13</sup> has lent significant credibility to the doctrine by formally

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8. Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 177, 179-180 (1991). See also D. RONEN, *THE QUEST FOR SELF-DETERMINATION* 1 (1979); HEATHER A. WILSON, *INTERNATIONAL LAW AND THE USE OF FORCE BY NATIONAL LIBERATION MOVEMENTS* 55-56 (1988). Brilmayer notes the evolution of "popular sovereignty" as the prime factor motivating the development of self-determination as a political theory. Brilmayer, *supra*, at 180.

9. Cass, *supra* note 5, at 24-25; Brilmayer, *supra* note 8, at 180; Robert E. Frankel, Comment, *Recognizing Self-Determination in International Law: Kuwait's Conflict with Iraq*, 14 LOY. L.A. INT'L & COMP. L.J. 359, 361 (1992).

10. Cass, *supra* note 5, at 25. To effectuate this transformation, the League of Nations devised the mandate system and appointed a League member to serve as a "guardian" of each colony until the colony demonstrated its ability to manage its own affairs. See QUINCY WRIGHT, *MANDATES UNDER THE LEAGUE OF NATIONS* 231 (1930). In 1947, the United Nations took control of colonies still under mandate. U.N. CHARTER art. 77, ¶ 1(a) ("The [international] trusteeship system shall apply to . . . territories now held under mandate . . ."). See *infra* note 12 and accompanying text.

Interestingly, the Allies refused to apply the principle of self-determination to their own colonies. Brilmayer, *supra* note 8, at 180. See also ALFRED COBBAN, *THE NATION STATE AND NATIONAL SELF DETERMINATION* 66-69 (1969).

11. Article 1 of the United Nations Charter provides, "The Purposes of the United Nations are: . . . To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples . . ." U.N. CHARTER art. 1, ¶ 2. Further, article 55 declares the U.N.'s commitment to international economic and social cooperation by seeking to create "conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples." *Id.* art. 55.

12. Brilmayer, *supra* note 8, at 181; Frankel, *supra* note 9, at 363-64. To facilitate decolonization, the U.N. Charter established the International Trusteeship System as a means "to promote the political, economic, social, and educational advancements of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned." U.N. CHARTER art. 76, ¶ b. Under the International Trusteeship System, the boundaries of the former colonies became the boundaries of the new states, and the new states were then free to exercise the right of self-determination. Frankel, *supra* note 9, at 363.

13. The General Assembly is the policy making body of the United Nations, composed of one to five delegates from each member nation; however, each member nation has only one vote. See generally U.N. CHARTER arts. 9-22 (discussing powers, duties, and structure of the General Assembly).

endorsing it in several legal instruments.<sup>14</sup>

International case law has shown great deference to the principle of self-determination, and the International Court of Justice<sup>15</sup> has recognized that states exercise the right of self-determination only through the actual *process* of integration, free association, or independence.<sup>16</sup> One judge succinctly captured the principle of self-determination when he stated, "It is for people to determine the destiny of the territory and not the territory the destiny of the people."<sup>17</sup> The Court, however, has also recognized that the provision of humanitarian aid, even without the permission of the government receiving it, does not constitute unlawful intervention and does not violate the principle of self-determination.<sup>18</sup>

At present, controversy rages as to the proper scope and role of the self-determination doctrine in contemporary public international law.<sup>19</sup> Most discord surrounds attempts to define both the "self" which may "determine," and the conditions under which the right to self-determination may be exercised. Once these critical questions are addressed, the challenge of assigning the right of self-determination a role in the modern structure of international law remains.

## 2. Present Ambiguity

Any attempt to determine the nature of the right of self-determination

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14. See, e.g., *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028 (1970); *International Covenant on Economic, Social, and Cultural Rights*, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966); *The Situation with Regard to Implementation of Declaration on Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1654, U.N. GAOR, 16th Sess., Supp. No. 17, U.N. Doc. A/L.366 (1961); *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/4684 (1960); *The Right of Peoples and Nations to Self-Determination*, G.A. Res. 637, U.N. GAOR, 7th Sess., Supp. No. 20, U.N. Doc. A/2361 (1952); *International Covenant on Civil and Political Rights*, adopted Dec. 16, 1966, 999 U.N.T.S. 171; *International Covenant on Economic, Social and Cultural Rights*, adopted Dec. 16, 1966, 993 U.N.T.S. 3.

15. Chapter XIV of the U.N. Charter established the International Court of Justice (I.C.J.) as "the principal judicial organ of the United Nations." U.N. CHARTER art. 92. By virtue of their membership in the United Nations, all members agree to comply with any I.C.J. decision in a case to which they are a party. *Id.* art. 94, ¶ 1. Furthermore, if a party fails to abide by an I.C.J. decision, the adverse party may request that the Security Council take measures to effectuate the judgment. *Id.* art. 94, ¶ 2.

16. *Western Sahara*, 1975 I.C.J. 4, 24-25 (Oct. 16).

17. *Id.* (separate opinion of J. Dillard).

18. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 4 (June 27). The court specifically stated: "There can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law." *Id.* at 114, ¶ 242.

19. See, e.g., Cass, *supra* note 5, at 21-22; Brilmayer, *supra* note 8, at 179; Frankel, *supra* note 9, at 360; Avishai Margalit & Joseph Raz, *National Self-Determination*, 87 J. PHIL. 443 (1990); see also Benedict Kingsbury, *Claims by Non-State Groups in International Law*, 25 CORNELL INT'L L.J. 481 (1992).

must begin with a definition of the "self"<sup>20</sup> which hopes to exercise that right under public international law. Commentators generally accept that the right of self-determination lies with individual nations or "peoples" and not individual persons.<sup>21</sup> However, despite its unambiguous adoption of the principle, and its application of the doctrine to "peoples," the United Nations has not defined when a "people" exists.<sup>22</sup> Indeed, several commentators contend that the concept of "peoples" resists a single defi-

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20. Widespread controversy exists regarding the appropriateness of the application of the concept of the "self" to a particular group of individuals. A full explication and analysis of all relevant theories falls beyond the scope of this Note. However, a brief discussion of the relevant theories, based on the liberal assumption that individuals constitute a government for their own benefit and not vice versa, may prove helpful to the reader. See generally, Robert W. McGee, *A Third Liberal Theory of Secession*, 14 LIVERPOOL L. REV. 45, 46-54 (1992).

Harry Beran espoused the "first" liberal theory of secession, stating that regions should permit secession, and thereby grant the right to self-determination, in all but the following six instances:

- (1) The group which wishes to secede is not sufficiently large to assume the basic responsibilities of an independent state.
- (2) [The group] is not prepared to permit sub-groups within itself to secede although such secession is morally and practically possible . . . .
- (3) [The group] wishes to exploit or oppress a sub-group within itself which cannot secede in turn because of territorial dispersal or other reasons . . . .
- (4) [The group] occupies an area not on the borders of the existing state so that secession would create an enclave . . . .
- (5) [The group] occupies an area which is culturally, economically or militarily essential to the existing state . . . .
- (6) [The group] occupies an area which has a disproportionately high share of the economic resources of the existing state.

Harry Beran, *A Liberal Theory of Secession*, 32 POL. STUD. 21, 30-31 (1984).

Anthony Birch enunciated a "second," more limited, liberal theory of secession by stating that regions should permit secession only in the following four instances:

- (1) The region was included in the state by force and its people have displayed a continuing refusal to give full consent to the union . . . .
- (2) The national government has failed in a serious way to protect the basic rights and security of the citizens of the region . . . .
- (3) The democratic system has failed to safeguard the legitimate political and economic interests of the region, either because the representative process is biased against the region or because the executive authorities contrive to ignore the results of that process . . . .
- (4) The national government has ignored or rejected an explicit or implicit bargain between sections that was entered into as a way of preserving the essential interests of a section that might find itself outvoted by a national majority . . . .

Anthony H. Birch, *Another Liberal Theory of Secession*, 32 POL. STUD. 596, 599-600 (1984).

Robert McGee offers a "third" liberal theory of secession when he contends: "[S]ecession is a right, not something one has to get permission for, and is always justified. There is no theoretical reason why the seceding group cannot be as small as a single individual, although there may be some technical difficulties involved when the entity seceding is this small." McGee, *supra*, at 45.

Although these arguments present an interesting philosophical debate, international law focuses the debate over the "self" upon group status as a "people." See *infra* note 21 and accompanying text.

For a comprehensive discussion of the extent to which minority status impacts a movement for secession, see Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 67 NOTRE DAME L. REV. 615 (1991).

21. Brilmayer, *supra* note 8, at 179; Cass, *supra* note 5, at 29 n.38; Frankel, *supra* note 9, at 368-369. This view is supported by the fact that the relevant international documents make reference to the self-determination rights of "peoples." See *supra* note 14.

22. Frankel, *supra* note 9, at 368.

dition because the concept has been inconsistently applied.<sup>23</sup> While the United Nations has recognized the right of self-determination for all "peoples," we have little indication of when a group of individuals rises to the level of a "people."<sup>24</sup>

Perhaps the most illuminating method of divining the contours of what constitutes a "people" emerges from the context of decolonialization. Critics generally accept the notion that native colonial inhabitants constitute a "people" and possess the right of self-determination within colonial boundaries.<sup>25</sup> To protect the interests of international harmony, international law limits the right of self-determination to colonial boundaries.<sup>26</sup> Thus, only those native inhabitants of former colonies clearly possess the right of self-determination.<sup>27</sup> However, beyond the colonial context, international law offers no specific guidance as to the circumstances under which a group constitutes a "people" and the right of self-determination applies.<sup>28</sup>

Once the "self" has been defined under international law, a number of factors limit the ability of the "people" to exercise the right of self-determination. For example, a "people" may not exercise the right of self-determination more than once.<sup>29</sup> Further, a "people" may not exercise the right of self-determination unless it has been subject to foreign or

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23. See, e.g., Rachel San Kronowitz et al., *Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations*, 22 HARV. C.R.-C.L. L. REV. 507, 597 (1987); Michla Pomerance, *Self-Determination Today: The Metamorphosis of an Ideal*, 19 ISR. L. REV. 310, 312 (1984); Kingsbury, *supra* note 19, at 500.

24. To further complicate matters, many commentators support the proposition that self-determination only applies to "peoples," not "minorities." See, e.g., JAMES CRAWFORD, *THE CREATION OF STATES AT INTERNATIONAL LAW* 91-93 (1979); WILSON, *supra* note 8, at 88; POMERANCE, *supra* note 6, at 2-3. Exactly when a "minority" becomes a "people" is unclear. See Addis, *supra* note 20, at 660 (arguing that ethnic minorities constitute "peoples").

25. Cass, *supra* note 5, at 29.

26. *Id.*

27. *Id.* at 29-30.

28. A number of commentators have established lists of criteria for determining when a group constitutes a "people." Among those criteria are: (1) a common history, (2) racial or ethnic ties, (3) cultural or linguistic ties, (4) religious or ideological ties, (5) a common territory or geographical location, (6) a common economic base, and (7) a sufficient number of people. See, e.g., International Commission of Jurists, *East Pakistan Study*, 8 INT'L COMMISSION JURISTS REV. 23, 47 (1972). In addition, Lea Brilmayer contends that the primary factor in validating a claim for self-determination or secession should lie in the group's territorial claim. Brilmayer, *supra* note 8, at 177. For an intensive evaluation of the criteria necessary to constitute a "people" for purposes of self-determination, see Ved P. Nanda, *Self-Determination Under International Law: Validity of Claims to Secede*, 13 CASE W. RES. J. INT'L L. 257, 275-78 (1981).

29. Rupert Emerson, *Self-Determination*, 65 AM. J. INT'L L. 459, 464 (1971). Emerson notes the position of the United Nations by quoting former United Nations Secretary General U Thant:

So far as the question of secession of a particular section of a Member State is concerned, the United Nations' attitude is unequivocal. As an international organization, the United Nations has never accepted and does not accept and I do not believe it will ever accept the principle of secession of a part of its Member State.

alien domination.<sup>30</sup> Further, a "people" must also recognize itself as a "people"<sup>31</sup> and desire to separate from the dominating state.<sup>32</sup>

## B. The Doctrine of Non-Intervention

The general body of international law and the United Nations have historically supported the doctrine of non-intervention.<sup>33</sup> Complementary to the right of self-determination, the tenets of sovereignty and equality among states lie at the foundation of the principle of non-intervention.<sup>34</sup> Acting partially out of self-interest, nations adopted the principle of non-intervention in their international political relations as a means to guarantee respect for international equality.<sup>35</sup>

The founders of the United Nations incorporated the doctrine of non-intervention in the United Nations Charter. Article 2(7) of the U.N. Charter states, "[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter."<sup>36</sup> The Charter qualifies this general support for the doctrine of non-intervention with a subsequent exception—"this principle shall not prejudice the application of enforcement measures under Chapter VII."<sup>37</sup> The consequences of this apparently limited exception to the general rule of non-intervention do not immediately present themselves. In order for the U.N. to adopt enforcement measures under Chapter VII of the Charter, the Security Council<sup>38</sup> must find that the controversy: (1) does not lie "essentially

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*Id.*

30. POMERANCE, *supra* note 6, at 14 (detailing problems with the "foreign domination" requirement).

31. Robert A. Friedlander, *Self-Determination: A Legal-Political Inquiry*, 1975 DET. C.L. REV. 71, 83.

32. Nathaniel Berman, *Sovereignty in Abeyance: Self-Determination and International Law*, 7 WIS. INT'L L.J. 51, 70 (1988).

33. See generally Ved P. Nanda, *Tragedies in Northern Iraq, Liberia, Yugoslavia, and Haiti—Revisiting the Validity of Humanitarian Intervention Under International Law—Part I*, 20 DENV. J. INT'L L. & POL'Y 305, 307 (1992); Cass, *supra* note 5, at 26; Delbrück, *supra* note 7, at 889; Mary Ellen O'Connell, *Continuing Limits on U.N. Intervention in Civil War*, 67 IND. L.J. 903, 908 n.38 (1992); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27); Barcelona Traction (Belgium v. Spain), 1970 I.C.J. 4, 32 (Feb. 5); LEE C. BUCHETT, SECESSION 43-127 (1978); Louise Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of Government*, 56 BRIT. Y.B. INT'L L. 189, 251 (1985).

34. Delbrück, *supra* note 7, at 889.

35. *Id.*

36. U.N. CHARTER art. 2, ¶ 7.

37. *Id.* Chapter VII of the Charter serves as the mechanism authorizing the Security Council to adopt measures which permit the use of force to bring nations into compliance with United Nations resolutions. See generally *id.* arts. 39-51 (discussing the scope of Security Council authority to authorize the use of force).

38. The Security Council is the executive body of the United Nations that may use diplomatic, economic, or military means to resolve international disputes. See generally U.N. CHARTER arts. 23-32 (discussing the composition, functions, and powers of the Security Council). The Security Council is an eleven member body with five permanent



within the domestic jurisdiction" of the state,<sup>39</sup> and (2) constitutes a threat to "international peace and security."<sup>40</sup> On its face, the Charter appears to forbid U.N. action that would interfere in a state's domestic affairs when the situation does not possess an "international" element. In addition to the prohibition in Article 2(7) of the U.N. Charter, Article 2(4) states: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."<sup>41</sup>

Two exceptions traditionally apply to the doctrine of non-intervention. Contemporary public international law recognizes the right of outside states to intervene in the affairs of a state when: (1) such intervention is in the actor's self-defense or pursuant to a request for assistance in the self-defense of another state, and (2) such intervention is aimed at the maintenance of international peace and security.<sup>42</sup> Article 51 of the U.N. Charter provides: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations . . . ."<sup>43</sup> The authority for an individual state to use force for the maintenance of international peace and security arises as a result of a determination by the Security Council that such force is necessary and a request upon said country to use that force. Article 42 of the Charter states: "[T]he Security Council . . . may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security."<sup>44</sup> Article 48(1) grants U.N. Member states the right to implement measures, including the use of

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members—the United States, the Soviet Union, France, Great Britain, and China—and six additional members that are elected at two year intervals. *Id.* art. 23.

39. *Id.* art. 2, ¶ 7.

40. *Id.* art. 39.

41. *Id.* art. 2, ¶ 4.

42. FERNANDO R. TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY 128 (1988); Jean-Pierre L. Fonteyne, *Forcible Self-Help by States to Protect Human Rights: Recent Views from the United Nations*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 199-200 (Richard B. Lillich ed., 1973).

43. U.N. CHARTER art. 51. In full, article 51 states:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

*Id.*

44. U.N. CHARTER art. 42. The United Nations Charter vests the Security Council with the sole authority to determine: (1) the existence of any threat to international order, and (2) the appropriate measures to remedy that threat. *Id.* art. 39. Article 39 states: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." *Id.* Article 41 provides the mechanism for

force, that the Security Council deems appropriate to maintain international order.<sup>45</sup> Absent a claim of self-defense or a request of the Security Council, a state may not intervene in the affairs of another state.<sup>46</sup>

### C. Humanitarian Intervention<sup>47</sup>

#### 1. *Pre- v. Post-Charter Era*

Constructing a precise definition of "humanitarian intervention" proves difficult.<sup>48</sup> Many commentators writing in the late nineteenth century and into the twentieth century believed intervention on humanitarian grounds justifiable when a state denied a specific minimum of rights to those within its territory, but only "in extreme cases . . . where great evils existed, great crimes were being perpetrated, or where there was *danger of race extermination*."<sup>49</sup> One commentator even claimed that "[t]yrannical conduct of a

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the Security Council to impose non-military sanctions to maintain or restore international peace and security. Article 41 provides:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

*Id.* art. 41. Article 42 authorizes the Security Council to use force to remedy threats to international order. In full, article 42 provides:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

*Id.* art. 42. Articles 41 and 42, interpreted together, require the Security Council to first consider "peaceful" means to protect or restore international peace and security before authorizing the use of force.

45. Article 48(1) provides: "The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine." *Id.* art. 48, ¶ 1.

46. The United Nations' Declaration of Non-Intervention supports this interpretation and states, "No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State." *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, G.A. Res. 2131, U.N. GAOR, 20th Sess., 1408th plen. mtg., Supp. No. 14 (1965) [hereinafter *Declaration of Non-Intervention*].

47. Humanitarian aid may have a wide variety of applications, such as the provision of medical supplies, but always presupposes the permission of the target state. Alternatively, humanitarian *intervention* does not require permission.

48. Nanda, *supra* note 33, at 311.

49. AMOS S. HERSHEY, *ESSENTIALS OF INTERNATIONAL PUBLIC LAW AND ORGANIZATION* 239 (rev. ed. 1927) (emphasis added). See also IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 338 (1963); WILLIAM E. HALL, *TREATISE ON INTERNATIONAL LAW* 337-350 (Pearce Higgins ed., 8th ed. 1924); HENRY G. HODGES, *THE DOCTRINE OF INTERVENTION* 1 (1915); ELLERY C. STOWELL, *INTERNATIONAL LAW: A RESTATEMENT OF PRINCIPLES IN CONFORMITY WITH ACTUAL PRACTICE* 349 (1931); ELLERY C. STOWELL, *INTERVENTION IN INTERNATIONAL LAW* 53 (1921) [hereinafter *INTERVENTION*]; ANN VAN WYMEN THOMAS & A. J. THOMAS, JR., *NON-INTERVENTION* 21 (1956).

government towards its subjects, massacres and brutality in a civil war, or religious persecution" constituted appropriate grounds for humanitarian intervention.<sup>50</sup> Despite the early consensus as to the doctrine's existence, it fell into disrepute for two reasons: (1) lack of a consensus upon the definition of "humanitarian" or "intervention,"<sup>51</sup> and (2) the potential for powerful states to abuse the doctrine.<sup>52</sup> The advent of the United Nations brought a new approach to humanitarian issues.

From the outset, the United Nations marked a clearer course for the status of "humanitarian intervention." Article 2(4) of the U.N. Charter forbids all U.N. members from using force "against the territorial integrity or political independence of any state."<sup>53</sup> In addition, Article 2(7) exempts from scrutiny under international law all "matters which are essentially within the domestic jurisdiction of any state."<sup>54</sup> Taken at face value, these provisions seem to establish an obligation on all U.N. mem-

50. HALL, *supra* note 49, at 302.

51. Christine Ellerman, *Command of Sovereignty Gives Way to Concern for Humanity*, 26 VAND. J. TRANSNAT'L L. 341, 344 (1993). No clear consensus existed as to what actions merited humanitarian intervention. One author defined humanitarian intervention as: "the reliance upon force for the justifiable purpose of protecting the inhabitants of another state from treatment which is so arbitrary and persistently abusive as to exceed the limits of that authority within which the sovereign is presumed to act with reason and justice." INTERVENTION, *supra* note 49, at 53. Another commentator characterized the "classical" definition of humanitarian intervention as:

[T]hose instances in which a nation unilaterally uses military force to intervene in the territory of another state for the purpose of protecting a sizable group of indigenous people from life-threatening or otherwise unconscionable infractions of their human rights that the national government inflicts or in which it acquiesces.

David J. Scheffer, *Toward a Modern Doctrine of Humanitarian Intervention*, 23 U. TOL. L. REV. 253, 264 (1992).

52. Fonteyne, *supra* note 42, at 218-20; BROWNIE, *supra* note 49, at 338-42. One commentator contends, "[H]umanitarian intervention, on the basis of all available definitions, would be an instrument wide open to abuse." Ian Brownlie, *Thoughts on Kind-Hearted Gunmen*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 146 (Richard B. Lillich ed., 1973). In addition to the ambiguity surrounding the definition of humanitarian intervention, general principles of international law require "necessity" and "proportionality." Nanda, *supra* note 33, at 311; Delbrück, *supra* note 7, at 901. Widespread disagreement also exists when defining the extent of "necessity" and "proportionality," and this ambiguity leads to the major criticism of a broad definition of humanitarian intervention. Because only powerful states find themselves in a position to exercise the "right" to intervene on humanitarian grounds, the lack of international guidelines and limitations provides little protection against its abuse. Nanda, *supra* note 33, at 309.

53. U.N. CHARTER art. 2, ¶ 4. Article 2 of the Charter lists the "principles" that guide all U.N. Members' international relations. Article 2(4) states: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." *Id.*

54. *Id.* art. 2, ¶ 7. Article 2(7) states:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

bers, and the organization itself, to refrain from acting to correct humanitarian concerns that do not escape the confines of a member state.<sup>55</sup> The U.N.'s Declaration of Non-Intervention supports this interpretation.<sup>56</sup>

## 2. Modern Debate

Despite the apparent clarity of international obligations arising under Articles 2(4) and 2(7) of the U.N. Charter, states have asserted the right to intervene in the affairs of another state when attempting to protect its own nationals within the jurisdiction of a foreign state,<sup>57</sup> to protect the nationals of a third state,<sup>58</sup> or even to protect the nationals of the state against which it directs the corrective steps.<sup>59</sup> Indeed, a narrow view of humanitarian intervention—breaching a state's territorial integrity for the limited purpose of rescuing one's nationals—seems widely accepted.<sup>60</sup> Definitive authority does not exist, however, for the proposition that a state or international body may intervene to terminate human rights violations.<sup>61</sup>

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*Id.* Because Chapter VII permits the Security Council to adopt enforcement measures only in situations that threaten international peace and security, *see supra* note 44, it appears that "domestic" matters are immune from international redress.

55. *See, e.g.,* Delbrück, *supra* note 7, at 892; Ellerman, *supra* note 51, at 346-47. Such an interpretation, so it is argued, emerges from the "plain language" of the Charter. Nanda, *supra* note 33, at 310.

56. *Declaration of Non-Intervention, supra* note 46. The declaration specifically provides, "No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal and external affairs of any other State." *Id.*

57. *See generally,* Ved P. Nanda, *The United States' Armed Intervention in Grenada - Impact on World Order*, 14 CAL. W. INT'L L.J. 395 (1984) (discussing the 1983 U.S. intervention in Grenada).

58. *See generally,* Ved P. Nanda, *The United States' Action in the 1965 Dominican Crisis: Impact on World Order*, 43 DENV. L.J. 439, 472-79 (1966) (discussing the 1965 U.S. intervention in the Dominican Republic).

59. *See generally* NATALINO RONZITTI, *RESCUING NATIONALS ABROAD THROUGH MILITARY COERCION AND INTERVENTION ON GROUNDS OF HUMANITY* 102 (1985) (discussing Tanzania's 1978 intervention in Uganda).

60. *See, e.g.,* U.N. Doc. S/PV. 1941 (1976) statement by the U.S. representative during the U.N. Security Council debate on the Entebbe rescue mission by Israel:

[T]here is a well established right to use limited force for the protection of one's own nationals from the imminent threat of injury or death in a situation where the State in whose territory they are located is either unwilling or unable to protect them. The right . . . is limited to such use of force as is necessary and appropriate to protect threatened nationals from injury.

*See also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 703 cmt. e (1987): "It is increasingly accepted that a state may take steps to rescue victims or potential victims in an action strictly limited to that purpose and not likely to involve disproportionate destruction of life or property in the state where the rescue takes place." *Id.*

61. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 703 cmt. e (1987):

Whether a state may intervene with military force in the territory of another state without its consent, not to rescue the victims but to prevent or terminate human rights violations, is not agreed or authoritatively determined. Such intervention might be acceptable if taken pursuant to resolution of a United Nations body or of a regional organization such as the Organization of American States.

In seeking to establish an international right of humanitarian intervention, commentators have adopted approaches that seek to reinterpret the present legal structures to fit the demands of an evolving international community. At the forefront of this movement is an attempt to redefine "sovereignty" and "territorial integrity," to fully clarify the scope of Article 2(4)'s prohibition against intervention.<sup>62</sup> Some commentators contend that an act of humanitarian intervention does not violate a state's "sovereignty" or "territorial integrity" because it is not aimed at "territorial conquest."<sup>63</sup> These commentators suggest that the doctrines of "sovereignty" and "territorial integrity" should not merely provide the internationally recognized regime with absolute control over all matters within its borders. Rather, they contend that the modern doctrine of "sovereignty" seeks to protect "popular sovereignty":

International law is still concerned with the protection of sovereignty, but, in its modern sense, the object of protection is not the power base of the tyrant who rules directly by naked power or through the apparatus of a totalitarian political order, but the continuing capacity of a population freely to express and effect choices about the identities and policies of its governors.<sup>64</sup>

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*Id.*

62. U.N. CHARTER art. 2, ¶ 4; see also *supra* text accompanying note 41.

63. Ellerman, *supra* note 51, at 354. See also W. Michael Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. INT'L L. 642 (1984). Reisman contends that Article 2(4) should be interpreted broadly, and a narrow construction "has been unable to provide would-be strict appliers with a legal characterization consistent with the relevant international policies . . . ." *Id.* at 644.

64. W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 872 (1990). Reisman further contends:

Happily, the international legal system in which declamations such as "l'etat, c'est moi" were coherent has long since been consigned to history's scrap heap. In our era, such pronouncements become, at least for audiences at a safe remove, the stuff of refined comedy. They would be occasions for general hilarity, even in the countries where they are still staged, were it not for the endless misery that the dictators who grant themselves sovereignty always inflict upon the human beings trapped within the boundaries of the territory the dictators have confused with themselves.

*Id.* at 870.

More troublesome is an acceptable construction of "territorial integrity" under Article 2(4). However, we reach an acceptable result by examining "territorial integrity," in this context, as an element of the "sovereignty" doctrine. In the late Middle Ages, rulers utilized the term "sovereignty" to resist claims of loyalty made by the pope or emperor, and to "establish a relationship of immediate obedience between ruler and individual subjects." 10 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 399 (1987). Today, international law recognizes that "[s]overeignty is a legal status within but not above public international law." *Id.* at 408. Further, the "scope of 'domestic affairs,' in general, is determined by international law," and "[h]uman rights are no longer considered an exclusively domestic affair." *Id.* at 411. Therefore, as a component of the concept of sovereignty, the meaning of "territorial integrity" must likewise be subject to definition by international law. If one reinterprets the "sovereign" as the people's representative, then undertaking an act which is for the benefit of the people, and one that does not unseat their representative structure, should neither harm the state's territorial integrity nor offend its sovereignty.

Thus, so long as a state intervenes solely to provide humanitarian assistance to the populace of the target state, neither the target state's sovereignty nor its territorial integrity have been violated.<sup>65</sup>

Other commentators have proposed remedying the debate over humanitarian intervention by reformulating the definition of "domestic jurisdiction" under Article 2(7).<sup>66</sup> The U.N. Charter imposes upon all its members the obligation to "fulfil in good faith the obligations assumed by them in accordance with the [United Nations] Charter."<sup>67</sup> One such obligation is "promoting and encouraging respect for human rights . . . ."<sup>68</sup> Commentators contend that these obligations impose duties to observe minimum levels of basic human rights, which, due to membership in the United Nations, are not "domestic" but "international."<sup>69</sup> Thus, when human rights violations occur, the U.N. Charter authorizes the Security Council to attempt to remedy the situation.<sup>70</sup>

## II. Current Situation in the Balkans

### A. Historical Ethnic Animosity & Modern Yugoslavia

In a region where no one culture holds a majority,<sup>71</sup> where cross cultural marriages abound, and where only an individual's last name serves to identify him or her as a member of a particular minority,<sup>72</sup> many find it

65. Ellerman, *supra* note 51, at 354-55; TESÓN, *supra* note 42, at 131.

66. U.N. CHARTER art. 2, ¶ 7. See also *supra* note 39 and accompanying text.

67. U.N. CHARTER art. 2, ¶ 2. In full, the Charter states: "All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present charter." *Id.*

68. *Id.* art. 1, ¶ 3, which states: "To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion;" *Id.* See also *id.* art. 55, which states:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

*Id.* art. 55 (emphasis added).

69. Delbrück, *supra* note 7, at 893; Ellerman, *supra* note 51, at 352.

70. *Id.* Such remedy must come under the enforcement measures of Chapter VII. See *supra* notes 44-45 and accompanying text.

71. Marc Weller, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 AM. J. INT'L L. 569 (1992). See also S. PAVLOWITCH, *THE IMPROBABLE SURVIVOR: YUGOSLAVIA AND ITS PROBLEMS 1918-1988* 64 (1988); B. MCFARLANE, *YUGOSLAVIA: POLITICS, ECONOMICS AND SOCIETY* 2 (1988).

72. McAllister, *supra* note 4, at 23. Several discrete and insular minorities comprise Yugoslavia's population. In 1988, 41.5% of the Yugoslavian population was Serbian (9.3 million individuals), and 20.1% of the population was Croatian (4.6 million). MCFAR-

difficult to understand how intense ethnic hatred survives. Yet despite this cultural diversity, ethnic divisions persist.<sup>73</sup> Historians tract the genesis of the present rigid ethnic divisions back over 600 years ago to the Battle of Kosovo.<sup>74</sup>

During the fourteenth century, the Ottoman Empire expanded into the region that was, until recently, Yugoslavia, and in 1389 the Ottoman Turks soundly defeated the native Serbs, beginning a reign that would last 500 years.<sup>75</sup> The decisive Turk victory at Kosovo strengthened the ethnic cohesiveness of the three primary southern Slavic minorities: Serbs, Croats, and Muslims.<sup>76</sup> When the Ottoman regime denied these minorities both political and trade rights, and imposed burdensome taxes, the Serbs retreated to the countryside and began to shun the cities.<sup>77</sup> However, despite the social hardship, the rebellious Serbs struggled under Ottoman rule and vigorously maintained their Eastern Orthodox faith.<sup>78</sup>

Croats fared better under the Turkish domination of the region, and Croatia received special treatment.<sup>79</sup> By 1699, after struggling with the

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LANE, *supra* note 71, at xviii. There are also 4.1 million Bosnians and Hercegovinians (18.7%) and 1.9 million Macedonians (8.2%). *Id.*

73. See *infra* part II.B, C.

74. Walter Russell Mead, *West Can't Quell Balkan Hatreds, Resentment in Region is Centuries Old*, ATLANTA J. & CONST., Aug. 16, 1992, at D2. See generally VLADIMIR DEDIJER ET AL., HISTORY OF YUGOSLAVIA (Stephen Clissold ed., 1974). Some critics contend that Kosovo, and the repression that followed, directly motivates the current conflict. Mead, *supra*, at D2. A more likely explanation is that current political leaders have played upon ethnic stereotypes to gain support for their movements. See, e.g., John Burns, *Serbian General is Either a Snake or a Charmer, Depending on the Beholder*, N.Y. TIMES, Aug. 8, 1993, at A14. Regardless of its origin, a very real spirit of ethnic animosity dominates the conflict. See *infra* part II.C.

75. DEDIJER ET AL., *supra* note 74, at 115-16; Mead, *supra* note 74, at D2. For centuries prior to Turkish ascendancy, the Balkan states—such as Serbia, Croatia, Bosnia, Zeta, and Dalmatia—maintained their independence through political maneuvering between the Hungarian monarchy and the Ottoman Empire, both of which had designs on the region. *Id.* at 127.

76. Mead, *supra* note 74, at D2. This cohesiveness arose, no doubt, as a result of the fundamental realignment of the former states' political structures. See DEDIJER ET AL., *supra* note 74, at 127.

77. DEDIJER ET AL., *supra* note 74, at 131. After the Serbs first arrived in the Balkan region in the seventh century A.D., the internal clans struggled for five centuries, both among themselves and with foreign influences, to establish a strong Serbian state. H.C. DARBY ET AL., A SHORT HISTORY OF YUGOSLAVIA FROM EARLY TIMES TO 1966 87 (1966). During the Nemanjic dynasty, under the leadership of Stefan Dusan, the Serbian state reached its zenith. FRED SINGELTON, A SHORT HISTORY OF THE YUGOSLAV PEOPLES 23-24 (1985). Dusan combined Serbian customs with Byzantine law and introduced Serbia's first legal code from 1349 to 1354. *Id.* at 25. The Serbian state fell to Turkish invasions after Dusan's death, and remained under the influence of the Turks until the mid-19th century. DARBY ET AL., *supra*, at 99-102.

78. Mead, *supra* note 74, at D2. Strong feelings of Serbian nationalism emerged in the Serbs' struggle against Turkish rule, and the intensity of these feelings grew as the 19th century progressed. DARBY ET AL., *supra* note 77, at 118-19.

79. *Id.* The Croats arrived in the region in the seventh century A.D. and by the 10th and 11th centuries the Croatian Kingdom flourished. SINGELTON, *supra* note 77, at 28-29. However, by the 12th century the Croats came under the control of Hungary. *Id.* at 29. Throughout this era the Croats viewed themselves as a separate nation with merely a common ruler. *Id.* Yet the Croatian status fluctuated from sovereign state to a vassal

Turks for over 300 years, the Catholic Hapsburgs controlled most of modern-day Croatia.<sup>80</sup> Although the Hapsburgs relegated native Croats to the status of second-class citizens, they did not view the Croats as rebels. Unlike the Serbs, Croats were free to develop their own culture within the confines of Hapsburg Catholicism; the Croats, in return, proved to be loyal subjects.<sup>81</sup>

The Battle of Kosovo had an important impact in Bosnia-Herzegovina.<sup>82</sup> Prior to Kosovo, both Orthodox Serbs and Catholic Croats had persecuted many Bosnians as "uncommitted" Christian "heretics."<sup>83</sup> By adopting the Islamic faith of their Ottoman conquerors, Bosnian converts attained legal equality, and many of the upper class found this an opportunity to preserve their status.<sup>84</sup> However, both Serbs and Croats, who were subjugated as defeated enemies, viewed this conversion as the ultimate heresy, and the seeds for ethnic conflict began to take root.<sup>85</sup>

The collapse of both the Hapsburg and the Ottoman Empires at the end of World War I finally provided the Serbs, Croats, and Muslims hope for an opportunity to arrange their national affairs without outside interference.<sup>86</sup> The Yugoslavia that emerged after World War I was an attempt to unite the southern Slavs and serve as a counterweight to both Hungary and Germany in the post-World War I balance of power.<sup>87</sup> However, the new nation shared only an intense mutual ethnic hatred and a superim-

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Hungarian state to a Turkish region. *Id.* Because of their close affiliation to Hungary, the Turks viewed the Croatian region with great caution and hesitated to provoke Hungary. DEDIJER ET AL., *supra* note 74, at 184-85.

80. Mead, *supra* note 74, at D2.

81. *Id.* The Croats expressed their loyalty to Hungarian leadership in many ways, but most significantly the Croats oversaw and led the Hungarian military. *Id.* Loyalty to the leadership of the region ended with the emergence of modern Yugoslavia at the end of World War I. *Id.* See also DEDIJER ET AL., *supra* note 74, at 355.

82. Prior to Turkish ascendancy, spurred by the decline of the Byzantine empire, many factions vied for rule of the territory currently known as Bosnia-Herzegovina. DEDIJER ET AL., *supra* note 74, at 59. By 1138, Bosnia was dominated by the Hungarian empire, and the Hungarians allowed for independent internal development. *Id.* As a result, the region failed to develop a strong church organization with significant ties to either Catholicism or the Eastern Orthodox faith. *Id.*

83. Mead, *supra* note 74, at D2. Although a tenuous tolerance existed between the Eastern Orthodox Serbs and the Catholic Croats, both parties viewed the lack of firm religious commitment as tantamount to "heresy." *Id.*

84. DEDIJER ET AL., *supra* note 74, at 137. Although some Serbs, Croats, and Bosnians converted to Islam, Bosnia was the site of the most widespread conversion. *Id.* at 180. This is probably because of the lack of strong church organization at the time of Turkish ascendancy. *Id.*

85. Mead, *supra* note 74, at D2. The Turks further exacerbated the situation when they forced Orthodox Serbs to work for a newly converted Bosnian aristocracy. DEDIJER ET AL., *supra* note 74, at 135. These insular minorities, which had constituted individual states prior to Turkish ascendancy, found the societal stratification based on religion intolerable, and hence a greater basis for ethnic cohesion. *Id.*

86. Mead, *supra* note 74, at D2.

87. Henry Kissinger, *Serbia Presents World with Inconceivable*, *HOUS. CHRON.*, Sept. 20, 1992, at A1.



posed language.<sup>88</sup> Internal ethnic and political conflict continued through 1941 when Nazi Germany invaded Yugoslavia for refusing to facilitate Germany's invasion of Greece.<sup>89</sup> The Nazis defeated a weak Yugoslavia in less than a week, driving the rebellious Serbs back into the hills where they renewed guerrilla warfare against the established leadership.<sup>90</sup> While the Serbs fled German oppression, many Croats viewed the Nazis as liberators who displaced the oppressive Serbian dominated leadership of Yugoslavia.<sup>91</sup> Ethnic division escalated further after the Nazi invasion as Croatian Fascists sought to establish a "Greater Croatia."<sup>92</sup> The new regime served as a puppet to Nazi rule and converted or killed rebellious Serbs.<sup>93</sup>

After World War II, Marshal Tito and the Yugoslavian Communists came to power,<sup>94</sup> killing tens of thousands of German collaborators and non-Communist opponents in the process.<sup>95</sup> Tito's secret police intimidated the Serbs, Croats, and Muslims.<sup>96</sup> Atheist Communism attempted to quell the various religious and ethnic aspirations by maintaining official hostility toward all religions.<sup>97</sup> However, the Communists' threats and intimidation could not eliminate the ethnic prejudice that had survived

88. *Id.* The founders of Yugoslavia erroneously assumed that "a Yugoslav nation already existed, with a common language and a common sense of community." SINGELTON, *supra* note 77, at 134.

89. Kissinger, *supra* note 87, at A1. The Declaration of Corfu on July 20, 1917 established the foundation for a union among the various ethnic groups in the region. DARBY ET AL., *supra* note 77, at 162. The new Kingdom of Serbs, Croats and Slovenes, which was renamed Yugoslavia in 1929, initially adopted a parliamentary democracy. McFARLANE, *supra* note 71, at 4-6. When the parliamentary democracy failed, a royal dictatorship followed, which in turn yielded to a mock parliamentary system. *Id.* The Axis invasion in 1941 interrupted Yugoslavia's attempts to independently structure its political regime. *Id.*

90. Kissinger, *supra* note 87, at A1; DEDJER ET AL., *supra* note 74, at 569-70.

91. Kissinger, *supra* note 87, at A1. Serbs played a key role in the Declaration of Corfu and from the beginning, conflict arose as to whether the Southern Slav state was an equal partnership—according to the Croat view—or an "enlarged Serbia"—as the Serbs believed. SINGELTON, *supra* note 77, at 125-27. By 1941, the Serbs had succeeded in dominating the Yugoslav government, and many Croats encouraged the Nazi invasion. Kissinger, *supra* note 87, at A1.

92. Mead, *supra* note 74, at D2; SINGELTON, *supra* note 77, at 175-77. The Nazis established the Independent State of Croatia (Nezavisna Drzava Hrvatska or "NDH"). *Id.* at 175. This regime, however, possessed little independence and neither received international recognition nor could act without the permission of occupying Axis forces. *Id.* at 177.

93. Mead, *supra* note 74, at D2; SINGELTON, *supra* note 77, at 177. Serbia claimed that the NDH killed 750,000 Serbs, while Germany estimated 350,000 Serbs were killed. *Id.* The Nuremberg trials later judged the extermination process as genocide. *Id.*

94. SINGELTON, *supra* note 77, at 207-09.

95. Kissinger, *supra* note 87, at A1.

96. *Id.*

97. Mead, *supra* note 74, at D2. Historians generally credit Tito with spurring great social, economic, cultural, and political changes in Yugoslavia, seeking above all else to preserve Yugoslavian unity. See generally STEVEN L. BURG, CONFLICT AND COHESION IN SOCIALIST YUGOSLAVIA, POLITICAL DECISION MAKING SINCE 1966 (1983); ALESKA DJILAS, THE CONTESTED COUNTRY, YUGOSLAV UNITY AND COMMUNIST REVOLUTION 1919-1953 (1991).

over 500 years of Ottoman oppression. The Serbs desperately sought to infiltrate and dominate the government and armed forces.<sup>98</sup> While the other nationalities resisted the Serbs' attempts,<sup>99</sup> Tito's death in 1980 removed the control of a powerful federal government, allowing the republics to exercise greater individual autonomy.<sup>100</sup>

## B. The Current Conflict

Prior to its recent dissolution, the Federal People's Republic of Yugoslavia consisted of six republics—Bosnia-Herzegovina (hereinafter "Bosnia"), Croatia, Macedonia, Montenegro, Serbia, and Slovenia—and two "autonomous" regions—Kosovo and Vojvodina.<sup>101</sup> A Presidential Council controlled the Federal Government.<sup>102</sup> The chairmanship of this collective presidency rotated among the leadership of the republics and autonomous territories according to a schedule established by the Yugoslavian Constitution.<sup>103</sup>

Formal dissolution of the Federal Republic began on September 27, 1990 when the Slovenian Parliament proclaimed that it would not apply federal legislation within the Republic of Slovenia.<sup>104</sup> The movement for independence soon spread, and by late December 1990, the Croatian Parliament declared that Croatian law would supersede federal legislation.<sup>105</sup> On December 23, 1990, in a special referendum election, nearly ninety

98. Mead, *supra* note 74, at D2. This reaction may relate to the Serbs' historical attempt to establish a "Greater Serbia." See *supra* note 91; *infra* note 128. Historians often trace the desire to create a "Greater Serbia" to an organization known as the Black Hand, founded in the early 20th century by Serbian army officers who sought to create a regime founded on the policy of military expansion. SINGELTON, *supra* note 77, at 116. The Black Hand is credited with sparking World War I when one of its conspirators, Gavrilo Princip, assassinated the heir to the Hapsburg throne, Archduke Franz Ferdinand. *Id.* at 117.

99. Mead, *supra* note 74, at D2.

100. Leonard J. Cohen, *Regime in Transition in a Disintegrating Yugoslavia: The Law-of-Rule vs. The Rule-of-Law*, 908 CARL BECK PAPERS 5 (1992). See also Kissinger, *supra* note 87, at A1.

101. Weller, *supra* note 71, at 569. On January 21, 1946, the Constituent Assembly, which had abolished the former monarchy of the region in favor of a unified state with a republican form of government, adopted the Constitution of the Federal People's Republic of Yugoslavia ("FPR"), based on the principles of democratic centralism and unity of authority. DEDJER ET AL., *supra* note 74, at 698. The FPR was to be composed of six republics—Serbia, Croatia, Slovenia, Bosnia-Herzegovina, Macedonia, and Montenegro. *Id.* The "autonomous" provinces of Vojvodina and Kosovo were to be located within the Serbian Republic. *Id.*

102. Weller, *supra* note 71, at 569.

103. *Id.*

104. *Id.* The lack of a strong central authority, combined with Serbian attempts to dominate Yugoslavia's political and economic structure, served as the foundation for the republics' movements for independence. See generally *id.* at 569-70.

105. *Id.* at 569. See also *Conference on Yugoslavia, Arbitration Committee Opinion No. 1*, 31 I.L.M. 1494, 1496 (1992) [hereinafter *Arbitration Opinion No. 1*]. Croatia held a referendum election in May 1991 on the issue of independence and formally declared its independence on June 25, 1991. *Id.* Enactment of the declaration was suspended until October 8, 1991. *Id.*

percent of the Slovenian voters chose independence.<sup>106</sup>

The republics within Yugoslavia began to negotiate the preservation of the Federal Government in the spring of 1991.<sup>107</sup> Discord soon arose, however, concerning the magnitude of federal power.<sup>108</sup> Unlike the Serbs, who had previously dominated the federation's political structure, the Croats and Slovenes sought a loose federation, free from Serbian domination.<sup>109</sup> When the other republics agreed upon the basic function and structure of a new Yugoslavia, the Serbs stormed out of the negotiations.<sup>110</sup> To maintain control over the Yugoslavian federation, the Serb military leadership explicitly disregarded the federal presidency, and declared martial law.<sup>111</sup>

Serbia further exacerbated the delicate situation by blocking the scheduled election of Stipe Mesic, a Croat, to the federal presidency.<sup>112</sup> In response to Serbia's denial of Mesic's constitutional right to the federal presidency under Yugoslavian law, Croatia overwhelmingly voted to secede from the federation on May 19, 1991.<sup>113</sup> Despite warnings by the Yugoslav Prime Minister that the Federal Government would use force to prevent unilateral secession, both Slovenia and Croatia formally declared independence on June 25, 1991.<sup>114</sup> On June 27, in an attempt to prevent secession, the armed forces of the central authorities attacked the provisional Slovenian militia.<sup>115</sup>

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106. Weller, *supra* note 71, at 569 (88.5% chose independence). *Id.* See also *Arbitration Opinion No. 1*, *supra* note 105, at 1496. Slovenia officially declared independence on June 25th, 1991, but suspended enactment until October 8, 1991. *Id.*

107. Weller, *supra* note 71, at 569.

108. *Id.* The initial disagreements among the parties centered on the relative strength of the central government. *Id.* at 569-570. In a referendum election in September 1991, Macedonian citizens voted "in favour of a sovereign and independent Macedonia" to be associated within a Yugoslav federation of States. *Arbitration Opinion No. 1*, *supra* note 105, at 1496. The Serbs wished to preserve their control over the region through a strong centralized government, while the other republics sought a loose federation to dilute Serbian influence. Weller, *supra* note 71, at 569. See also Graff, *Yugoslavia: Dangerous Muddle*, TIME, May 27, 1991, at 37; *Yugoslavia: Humpty Dumpty*, TIME, Apr. 1, 1991, at 50.

109. Weller, *supra* note 71, at 569.

110. *Id.* at 569-70.

111. *Id.* at 570. Under the constitutional arrangements of the federation, the federal president possessed the power to act as commander in chief of the Yugoslav military. *Id.* The declaration of martial law by the Serbian military leadership expressly contradicted the position of the current federal president. *Id.*

112. *Id.* Despite Croatia's threat to secede if Mesic was not elected, Serbia succeeded in obtaining the support of Montenegro, Kosovo, and Vojvodina to block the scheduled election. *Id.*

113. *Id.* (93.24% approved the referendum). *Id.*

114. *Id.* On June 24, 1991, the Yugoslav Prime Minister warned that "the Federal Government will use all means available to stop the republics' unilateral steps toward independence." *Id.* Their objection to the republics' ability to unilaterally secede seems to constitute the foundation of the Serb argument against independence. See *infra* note 169 and accompanying text.

115. Weller, *supra* note 71, at 570. In response, the Slovenian authorities declared that a "state of war" existed and sought assistance from the European Community, Conference on Security and Co-operation in Europe, and the United Nations. *Id.*

Hostilities soon spread to Croatia, where Serbian rebels, supported by Federal Government forces, accused Croatian authorities of unconstitutionally arming nationalist groups.<sup>116</sup> The small Serbian population, inhabiting ethnic enclaves in Croatia, decided to remain within the federation of Yugoslavia and seceded from Croatia.<sup>117</sup> The Federal Government justified its support of these rebel forces by claiming it sought to protect the legitimate "national and civil rights" of fellow Serbs.<sup>118</sup>

The movement for independence spread, and by January 26, 1992, the Bosnian parliament voted to hold a national referendum on independence.<sup>119</sup> Nearly sixty-three percent of the voters approved the subsequent referendum.<sup>120</sup> In early March, Bosnian authorities declared that if the Federal Government forces did not leave Bosnia after it officially proclaimed its independence, Bosnian authorities would regard the federal troops as an occupying force.<sup>121</sup> By April, Serbian leaders within Bosnia, taking their cue from ethnic Serbs in Croatia and the Federal Government, repudiated Bosnian independence and began a violent movement to overthrow the Bosnian leadership in Sarajevo and prevent international recognition.<sup>122</sup> Serbian rebels, supported by the heavily armed federal forces, soon gained control of significant portions of Bosnia.<sup>123</sup>

### C. The Role of "Ethnic Cleansing"

The policy of "ethnic cleansing"—the systematic removal of the members of one ethnic group by the members of another in an attempt to "purify" territorial regions<sup>124</sup>—began soon after the outbreak of violence in Bosnia.<sup>125</sup> The displacement of ethnic minorities is the purpose of ethnic cleansing rather than a side-effect.<sup>126</sup> To achieve this objective, initially Serbs, and now Croats and Bosnians as well, use tactics reminiscent of the Nazi war crimes of World War II.<sup>127</sup>

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116. *Id.* at 574.

117. *Id.*

118. *Id.* The support of Serbian rebel forces was justified as "essential to protect the Serbian people from extermination." *Id.*

119. *Id.* at 597 n.163. The referendum came in response to a challenge by the Serbian community within Bosnia to the validity of the sovereignty resolution adopted by the Bosnian Parliament on October 14, 1991. See *Arbitration Opinion No. 1*, *supra* note 105, at 1496.

120. *Bosnia Leader Warns Serbs to Respect Vote Verdict*, THE TIMES (London), Mar. 4, 1992, at 8.

121. Weller, *supra* note 71, at 597 n.163.

122. *Id.* at 597.

123. *Id.* Bosnian authorities attempted to respond to the rapid spread of hostilities by mobilizing territorial defense units, but these units proved no match for the armaments, including air forces, supplied by the central authorities. *Id.*

124. Watson et al., *supra* note 4, at 16; McAllister, *supra* note 4, at 21-23.

125. Watson et al., *supra* note 4, at 16.

126. Stanley Meisler, *Bosnia Muslims Face Extinction*, U.N. Study Says, L.A. TIMES, Oct. 29, 1992, at A1; Pierre Bertrand, *An Operational Approach to International Refugee Protection*, 26 CORNELL INT'L L.J. 495, 500 (1993).

127. See, e.g., Jamal Karj, *The Serb Savagery in Bosnia is Reminiscent of Hitler's Nazis*, SAN DIEGO UNION-TRIB., July 24, 1993, at B11; Anthony Bazcarich, *Holocaust in Bosnia*, L.A. TIMES, July 23, 1993, at B6; Elaine Sciolino, *In Bosnia, Peace at Any Price is Getting More*

Although no one knows exactly where or when the practice of ethnic cleansing began, most reported incidents involve alleged abuses by Bosnian Serbs.<sup>128</sup> Serbian leaders deny the existence of the practice;<sup>129</sup> however, many observers posit that ethnic cleansing began as part of a plan to create a "Greater Serbia."<sup>130</sup> Despite the large number of incidents involving Serbian soldiers and Bosnian Muslim civilians, more recent reports indicate that the practice has spread, and the list of victims has grown to include both Serbs and Croats.<sup>131</sup>

A growing body of evidence suggests that Serbs, and others responsible for practicing ethnic cleansing, have undertaken genocide.<sup>132</sup> Rumors

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*Expensive*, N.Y. TIMES, Jan. 10, 1993, at D4; Michael Getler, *Horrors of the Conflict in Bosnia Recall the Nazi Nightmare of a Half-Century Ago*, WASH. POST, Dec. 21, 1992, at A14; Carol J. Williams, *West Seeking Consensus on Halting Balkan Horrors*, L.A. TIMES, Aug. 24, 1992, at A1. Professor Cherif Bassiouni is leading a team to collect evidence of abuses committed in Yugoslavia in an attempt to facilitate the prosecution of War Crimes. Stephen Franklin & Terry Atlas, *Chicagoans Help U.N. Compile Bosnia War Crimes*, CHI. TRIB., Aug. 30, 1993, at 1.

128. On May 12, 1992, in a report on the situation in Bosnia, the Secretary-General stated: "[A]ll international observers agree that what is happening is a concerted effort by the Serbs of Bosnia and Herzegovina, with the acquiescence of, and at least some support from, the JNA [Yugoslav People's Army], to create 'ethnically pure' regions . . . ." *Further Report of the Secretary-General Pursuant to Security Council Resolution 749* (1992), U.N. SCOR, 47th Sess., U.N. Doc. S/23900 (1992).

129. Both Slobodan Misloveć, the Serbian Prime Minister, and Radovan Karadzic, the leader of the Serbian rebel forces in Bosnia, have denied responsibility for ethnic cleansing and have considered it a practice exercised only by Serb irregulars. McAllister, *supra* note 4, at 21-23; Laura Silber, *Serbs Agree to Allow Red Cross Into Camps*, WASH. POST, Aug. 9, 1992, at A1. However, the Serbian central government authorities continue to arm Serb rebels responsible for displacing hundreds of thousands of Muslims in both Bosnia and Croatia. McAllister, *supra* note 4, at 21-23; Silber, *supra*, at A1.

130. McAllister, *supra* note 4, at 23. See also Trevor Rowe, *U.N. Report: Serb Actions Undermining World Body*, WASH. POST, Nov. 25, 1992, at A12; Thom Shanker, *Bosnian Truce at Last? Winter, War Gains Favor Cease-fire*, CHI. TRIB., Nov. 11, 1992, at 1; Anthony Lewis, *Abroad at Home: Suffer the Children*, N.Y. TIMES, Nov. 9, 1992, at A17; J.F.O. McAllister, *Ever Greater Serbia*, TIME, Sept. 28, 1992, at 55.

131. Roy Gutman, *Croat "Cleansing": Freed Muslims Tell of Brutality by Their Former Allies*, NEWSDAY, July 23, 1993, at 8; Estelle Lander, *New Report on Atrocities*, NEWSDAY, Nov. 7, 1992, at 4; John F. Burns, *In a "Cleansed" Bosnian Town, Croats, Not Serbs, Aim Guns*, N.Y. TIMES, Oct. 30, 1992, at A1.

132. See, e.g., *Croatians Hold 1,300 Muslims*, CHI. TRIB., May 12, 1993, at 1; Bruce W. Nelan, *More Harm Than Good*, TIME, Mar. 15, 1993, at 40; Saul Friedman, *70,000 Bosnians in Secret Camps*, NEWSDAY, Jan. 7, 1993, at 15 [hereinafter *70,000 Bosnians in Secret Camps*]; Frank McCloskey, *The U.S. Is Appeasing Facism and Genocide*, CHRISTIAN SCI. MONITOR, Dec. 31, 1992, at 19; Elaine Sciolino, *U.S. Names Figures It Wants Charged With War Crimes*, N.Y. TIMES, Dec. 17, 1992, at A1; Saul Friedman, *75,000 Bosnians Held; Serbs Eye Next Push*, NEWSDAY, Dec. 16, 1992 at 17 [hereinafter *75,000 Bosnians Held*]; Mary Battiat, *Serbs Stymie U.N., Step-Up "Cleansing"*, WASH. POST, Dec. 7, 1992, at A25 [hereinafter *Serbs Stymie U.N.*]; Bill Gertz, *Serbian Warlord Called "Criminal" by U.S. Official*, WASH. TIMES, Dec. 1, 1992, at A7; Lander, *supra* note 131; *Cornfield May Hold 300 Killed by Serbs*, CHI. TRIB., Nov. 29, 1992, at 4; Chuck Sudetic, *U.N. Investigating Croats' Grave Site*, N.Y. TIMES, Nov. 29, 1992, at A1; Rowe, *supra* note 130; Mary Battiat, *Bosnian Serb Police Unit is Accused of Massacre of Muslim Prisoners*, WASH. POST, Sept. 22, 1992, at A17; Nina Bernstein, *Trapped in Bosnia: Mentally Disabled Left Behind*, NEWSDAY, Aug. 29, 1992, at 67 [hereinafter *Trapped in Bosnia*]; A.D. Horne, *U.N. Inspection Team Barred From Serb-Run Prison Camp in Bosnia*, WASH. POST, Aug. 25, 1992, at A10; Nina Bernstein & Roy Gut-

of possible Serb abuses first surfaced in June 1992, and by August, reports of abuse had escalated to such a level that Serb authorities, after initial refusal,<sup>133</sup> offered to allow the International Red Cross access to their detention camps in an attempt to preclude international intervention.<sup>134</sup> After inviting Red Cross inspections, however, Serb leaders went to great pains to see that inspectors discovered no mistreatment by relocating tens of thousands of prisoners, orchestrating prisoner interviews, removing evidence of abuses and refusing to permit unannounced inspections.<sup>135</sup>

The extensive list of official and unofficial reports of systematic killings includes the following:

- An August 21, 1992 massacre of over 200 Muslim men and boys by Serb police in the Vlasica mountains in Central Bosnia;<sup>136</sup>
- The murder of 2,000 to 3,000 Muslim men, women, and children in May and June of 1992 by Serb irregulars at a brick factory and pig farm near Brko;<sup>137</sup>
- The May 18, 1992 murder of 56 Muslims by Serb militiamen in Grbavci;<sup>138</sup>
- The regular, daily execution of 20 Muslim prisoners held by Serbs at the Omarska Camp in central Bosnia;<sup>139</sup>
- Serb soldiers breaking the necks of Muslim children abandoned in a hospital;<sup>140</sup>
- The November 20, 1991 mass killing of 300 Muslims by Serb soldiers outside Vukovar;<sup>141</sup> and,
- The execution of as many as 5,000 Muslims in late May of 1992 by Serbian forces in the town of Kozarac.<sup>142</sup>

By the end of 1992, one report estimated that Serb forces had killed as many as 200,000 Bosnian Muslims (nearly ten percent of the Muslim population).<sup>143</sup> Despite the international outcry,<sup>144</sup> and denial by Serb leaders of "systematic" executions, by early 1993 sources reported that Serbs

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man, *Inmate Shuffle; Serbs Invite Inspection, But Evidence of Atrocities Removed*, NEWSDAY, Aug. 21, 1992, at 3; Silber, *supra* note 129.

133. Bernstein & Gutman, *supra* note 132.

134. Silber, *supra* note 129. Radovan Karadzic attributed the publicity surrounding the allegations of "ethnic cleansing" to a plot designed to encourage foreign intervention. *Id.*

135. Bernstein & Gutman, *supra* note 132. Serb leaders also refused to allow U.N. inspectors access to detention camps to conduct their own investigation. Horne, *supra* note 132.

136. Sciolino, *supra* note 132.

137. *Id.*

138. *Id.*

139. Lander, *supra* note 131.

140. *Id.*

141. *Cornfield May Hold 300 Killed by Serbs*, *supra* note 132. See also Sudetic, *supra* note 132.

142. Rowe, *supra* note 130.

143. McCloskey, *supra* note 132. Sadako Ogata, the United Nations High Commissioner for Refugees, dispatched to examine the crisis in the Balkan region, stated, "if only 10% of the information [reports regarding alleged atrocities] is true, we are witnessing a massacre." Nelan, *supra* note 132.

144. Sciolino, *supra* note 132; Gertz, *supra* note 132.

held as many as 75,000 Bosnians in concentration camps.<sup>145</sup> Serb leaders seemed either unwilling or unable to prevent continued atrocities.<sup>146</sup>

In addition to genocide, reports accuse Serbs of attempting to destroy the Muslim national, religious, and cultural identity through the systematic rape of Muslim women.<sup>147</sup> Although both Muslims and Croats are also responsible for widespread rape, only Serbs appear to have used rape

145. 70,000 Bosnians in Secret Camps, *supra* note 132; 75,000 Bosnians Held, *supra* note 132.

146. *Serbs Stymie U.N.*, *supra* note 132. See also *Trapped in Bosnia*, *supra* note 132. Reports accused Serbs of relying heavily on "cultural devastation" to accomplish their goals. "Cultural devastation" refers to the practice of targeting Muslim cultural sites for destruction in an attempt to rid the region of all Islamic influences. Roy Gutman, *Unholy War: Serbs Target Culture, Heritage of Bosnia's Muslims*, *NEWSDAY*, Sept. 2, 1992, at 3 [hereinafter *Unholy War*]. See also Roy Gutman, *The New Enemy: Serbs at Bay, Bosnian Town Fights Hunger*, *NEWSDAY*, Aug. 20, 1992, at 8 [hereinafter *New Enemy*]; Charles T. Powers, *Fear and Hopelessness Grip Muslims in a Bosnian Town*, *L.A. TIMES*, Aug. 17, 1992, at A1. On April 8, 1992, in the town of Zvornik, Serbs allegedly destroyed or damaged 19 mosques. *Unholy War*, *supra*. Reports accuse Serbs of destroying 90% of the mosques in areas that they occupy, as well as executing, detaining, or expelling from Bosnia more than 370 imams—Muslim clergymen. *Id.* Serb rebels reportedly utilize various means to terrorize and dishearten the Muslim population. From the minaret (the tower used to call Muslims to prayer) of one seized mosque, Serb rebels have hung a skull-and-crossbones flag and continually blast tapes of Serbian nationalist songs riddled with threats meant to intimidate the Muslim population. *Id.* One recording has been reported to play repeatedly: "If you're not with us, we will kill you. We will slit your throats;" and "You're a liar if you say Serbia is small." *Id.*

In addition to reducing the vast majority of Muslim historical sites to rubble, Serbs have repeatedly attempted to force Muslim leaders to desecrate their religious institutions. In the village of Novo Selo, Serbs forced 150 Muslim women and children to watch as they attempted to force a local leader to make the sign of the cross, eat pork, and have sexual intercourse with a teenage girl. *Id.* When the leader refused, he was beaten, cut with knives, and dragged away. *Id.* Similar reports abound accusing Serbs of regularly rounding up Muslims to watch as their leaders are beaten, forced to violate Muslim religious law, and then killed. *Id.* See also Roy Gutman, *Hatred Up Close, Bosnia: "Terrible Things are Happening, Please Come"*, *NEWSDAY*, Dec. 31, 1992, at 101; *Sarajevo Witness*, *WASH. POST*, Dec. 8, 1992, at A18; Tadeuz Mazowiecki, *Witness to Horror: "Ethnic Cleansing" Threatens the Concept of Human Rights Everywhere*, *WASH. POST*, Nov. 29, 1992, at C7; Bujar Bukoshi, *Serbia's Next Victim*, *WASH. POST*, Nov. 28, 1992, at A23. Serbs have also been reported to have used mosques as slaughterhouses, morgues, and prisons, forcing thousands of prisoners to eat pork or starve, and denying them access to toilets, permitting them only to relieve themselves in sacred ablution basins. *Unholy War*, *supra*. Many believe that these tactics have already helped to cleanse these areas "psychologically" of any Muslim influence. Powers, *supra*.

In addition, reports abound accusing soldiers of forcing Muslims to leave their homes and sign over all legal rights to their property in exchange for the opportunity to leave communities where they regularly face starvation and threats of violence. *Id.* See also *New Enemy*, *supra*; Mary Battiat, *New Wave of Terror Described to U.N., E.C. Envoys*, *WASH. POST*, Sept. 26, 1992, at A16; Roy Gutman, *Serb Terror Continues: Armies Ignore Massacre Deadline*, *NEWSDAY*, Sept. 15, 1992, at 7; A.D. Horne, *Muslims in Serb-Run Town Tell of Repression and Worry About Worse*, *WASH. POST*, Aug. 17, 1992, at A10.

147. Lance Morrow, *Unspeakable*, *TIME*, Feb. 22, 1993, at 48. See also Tom Squitieri, *At Shelter, Victims Share Horror of Rape*, *USA TODAY*, July 8, 1993, at A8; Leslie Sowers, *Angered into Action; Use of Rape as a War Tactic in the Bosnian Conflict Has Prompted Muslim Women to Unite in Rare Public Protest*, *HOUS. CHRON.*, June 8, 1993, at 1; Sciolino, *supra* note 127; Peter Maass, *The Rapes in Bosnia: A Muslim Schoolgirl's Account*, *WASH. POST*, Dec. 27, 1992, at A1.

as a tool to achieve their goal of ethnic cleansing.<sup>148</sup> Reports contend that Serbs round up Muslim women and girls, and take them to "camps" located in seized inns, hotels, schools, town halls, and restaurants where they are raped by scores of Serb soldiers.<sup>149</sup> After the Serbs finish raping their victims, they either release them, kill them, or transfer the women to the larger Serb-run concentration camps in Bosnia.<sup>150</sup> One captured Serb soldier admitted to being ordered to rape Muslim women and kill them after the incident.<sup>151</sup>

Bosnian authorities report that Serbs have raped as many as 50,000 Muslim women.<sup>152</sup> To Bosnians, the two-fold purpose of this form of Serbian aggression is apparent. Rape not only shatters the identity and morale of the individual woman and her community, but also weakens her group's religious and cultural identity in a region that places the utmost value on racial purity.<sup>153</sup> To Serbs, mass rape achieves the objective of ethnic cleansing by polluting the Muslim gene pool.<sup>154</sup>

### III. Failure of the Established Legal Structure

#### A. The International Response

##### 1. Initial Diplomatic Mediation

After the outbreak of violence in June 1991, the European Community ("E.C.") responded quickly by sponsoring peace talks.<sup>155</sup> By August 1992, the failure of both U.N. and E.C. mediators to reach a peaceful solution, and the public outcry over the alleged human rights violations in Serbian detention camps, prompted both Central Intelligence Agency and Senate Foreign Relations Committee investigations.<sup>156</sup> Although these initial reports noted that human rights abuses—such as "killing and torture"<sup>157</sup>—had occurred at Serbian detention camps, and the camps often amounted to "centers for systematic torture and murder,"<sup>158</sup> they concluded that "no evidence of a concerted plan to kill systematically the Muslim population" existed.<sup>159</sup>

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148. Morrow, *supra* note 147, at 49.

149. *Id.* The Serb soldiers often euphemistically refer to this systematic rape as "interrogation." *Id.*

150. *Id.*

151. Maass, *supra* note 147.

152. Morrow, *supra* note 147, at 48. A more "moderate" estimate by the European Community places the number of women raped as a part of the Serbian campaign at 20,000. Sciolino, *supra* note 127.

153. Morrow, *supra* note 147, at 48-49.

154. *Id.* at 49.

155. Weller, *supra* note 71, at 571.

156. David Binder, *U.S. Finds No Proof of Mass Killing at Serb Camps*, N.Y. TIMES, Aug. 23, 1992, at A18.

157. *Id.*

158. John M. Goshko, "Ethnic Cleansing" by Serb Militias Found to Result in Many Deaths, WASH. POST, Aug. 19, 1992, at A15.

159. Binder, *supra* note 156.



In September 1991, the U.N. responded to the outbreak of violence in the former Yugoslavia by imposing an arms embargo on all parties to the conflict.<sup>160</sup> Resolution 713 expressed the international community's refusal to recognize territorial gains that resulted from violence.<sup>161</sup> The resolution also declared that "the continuation of this situation constitutes a threat to international peace and security."<sup>162</sup> While the U.N.'s initial response carried forward the efforts of the E.C. to mediate a peaceful resolution, the U.N. also called on all states to do their best to facilitate a peaceful resolution,<sup>163</sup> and imposed upon all states a duty of nonintervention.<sup>164</sup>

After the adoption of Resolution 713, the Secretary-General of the U.N. contacted Lord Carrington (the chairman of the peace conference on Yugoslavia), the Yugoslav Minister of Foreign Affairs, and representatives of the E.C., the Conference on Security and Co-operation in Europe ("C.S.C.E."), and neighboring states to arrange and promote peace negotiations.<sup>165</sup> The Secretary-General also contacted Cyrus Vance, requesting that he act as the Secretary's personal envoy.<sup>166</sup>

From the outset, Serbian forces within Yugoslavia resisted a peaceful resolution. After the adoption of Resolution 713, four Serbian members of the Yugoslav federal presidency, without the approval of the remaining members, but with the consent of senior military officials (who were also Serbian), decided to conduct federation affairs independently.<sup>167</sup> Serbian authorities also resisted several agreements that would have brought about a peaceful resolution.<sup>168</sup> Serbs deemed one agreement unsuitable because they claimed it "recognized the legality of unilateral secession."<sup>169</sup>

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160. S.C. Res. 713, U.N. SCOR, 46th Sess., 3009th mtg., at 3, U.N. Doc. S/Res/713 (1991).

161. *Id.* at 2. The General Assembly also officially declared its adherence to this principle. See *infra* note 181.

162. S.C. Res. 713, *supra* note 160, at 1.

163. *Id.* at 2. For a comprehensive description of the U.N.'s initial response to the crisis, see Weller, *supra* note 71, at 577-580.

164. S.C. Res. 713, *supra* note 160, at 3.

165. Weller, *supra* note 71, at 581.

166. *Id.* From the outset, representatives of influential states and organizations—such as the United States, European Community, and Conference on Security and Co-operation in Europe—voiced their support for maintaining the territorial integrity of Yugoslavia. *Id.* at 570. Critics contend this action was inappropriate and strengthened the intransigence of the Serb leadership in the negotiations. *Id.*

167. *Id.* at 581. The result of this action was the creation of the "rump presidency" which impaired the authority and legitimacy of the central government in subsequent dealings with the republics. *Report of the Secretary-General Pursuant to Paragraph 3 of S.C. Res. 713 (1991)*, paras. 21, 31, U.N. Doc. S/23169 (1991). To complicate matters further, Slovenia and Croatia responded by implementing declarations of independence that had previously been suspended by the terms of the initial ceasefire agreement of June 25, 1991. *Ceasefire as Croats Declare Independence*, THE TIMES (London), Oct. 9, 1991, at 1.

168. See, e.g., Weller, *supra* note 71, at 581-83.

169. U.N. Doc. S/23169, *supra* note 167, para. 23. The agreement would have: (1) formed an alliance of sovereign republics, (2) provided for adequate protection of minority human rights, and (3) recognized only agreed-upon changes in borders—

Serbia continued to resist peace agreements despite the threat of trade sanctions from the European Community. After the E.C. deadline of November 5, 1991 passed without Serbian concessions, the E.C. imposed sanctions.<sup>170</sup>

By late February 1992, in response to the frequent violations of the initial cease-fire agreement between Croatia and Serbia, the Security Council adopted Resolution 743.<sup>171</sup> Under Article 25 of the U.N. Charter, the resolution called for the development of a peace-keeping force to provide humanitarian assistance in Sarajevo and supervise the withdrawal of federal troops from Croatia.<sup>172</sup> However, despite the presence of U.N. Protection Forces, the situation in Bosnia continued to deteriorate and Bosnian Serbs increased their "ethnic cleansing" practices.<sup>173</sup> By May, the Secretary-General determined the situation unfit for peace-keeping treatment.<sup>174</sup> Instead, the Security Council adopted Resolution 752, which mandated that all parties in Bosnia observe the ceasefire agreement of April 12 and cooperate in peace-keeping negotiations.<sup>175</sup> The resolution also required all parties to ensure safe conditions to facilitate the distribution of humanitarian aid in the region.<sup>176</sup> When the parties in Bosnia failed to comply, the Security Council, attempting to force compliance, adopted Resolution 757 and imposed strict economic sanctions.<sup>177</sup>

Before the Security Council imposed economic sanctions, the United Nations General Assembly passed three resolutions which characterize the nature of the Yugoslav conflict. On May 22, 1992, after receiving the recommendations of the Security Council, the General Assembly admitted the Republic of Slovenia,<sup>178</sup> the Republic of Bosnia and Herzegovina<sup>179</sup> and the Republic of Croatia<sup>180</sup> as members of the United Nations. Such

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Serbs continued to assert the objection that unilateral secession is impermissible, yet did little to negotiate a peaceful resolution. See, e.g., Weller, *supra* note 71, at 581-83.

170. *Id.* at 583.

171. S.C. Res. 743, U.N. SCOR, 47th Sess., 3055th mtg., at 8, U.N. Doc. S/RES/743 (1992).

172. *Id.* See also *U.N. Peace Keepers Deployed*, WASH. POST, Jan. 18, 1992, at A24. The initial force was to contain 13,870 personnel. *Id.*

173. Weller, *supra* note 71, at 602.

174. *Further Report of the Secretary-General Pursuant to S.C. Res. 749 (1992)*, para. 25, U.N. Doc. S/23900 (1992). Pursuant to a report by Under-Secretary General for Peace-Keeping Operations, who the U.N. dispatched in April 1992 to investigate the feasibility of peace-keeping forces in the area, the Secretary-General found that the lack of agreement among the principal parties to the conflict prevented the U.N. from deploying a traditional peace-keeping force. See Weller, *supra* note 71, at 601-02.

175. S.C. Res. 752, U.N. SCOR, 47th Sess., 3075th mtg., at 12, U.N. Doc. S/RES/752 (1992).

176. *Id.*

177. S.C. Res. 757, U.N. SCOR, 47th Sess., 3082d mtg., at 13, U.N. Doc. S/RES/757 (1992).

178. G.A. Res. 236, U.N. GAOR, 46th Sess., Supp. No. 49A, at 5, U.N. Doc. 46/236 (1992).

179. G.A. Res. 237, U.N. GAOR, 46th Sess., Supp. No. 49A, at 5, U.N. Doc. 46/237 (1992).

180. G.A. Res. 238, U.N. GAOR, 46th Sess., Supp. No. 49A, at 5, U.N. Doc. 46/238 (1992).

action recognized the validity of each republic's secession from the former Yugoslavia.<sup>181</sup>

By September 22, 1992, the parties had failed to reach a peaceful solution. In an unprecedented move, the General Assembly voted (127 to 6) to ban Yugoslavia from voting and speaking in the General Assembly and its committees.<sup>182</sup> United States Ambassador Edward Perkins interpreted the U.N. declaration as stating that the original federation ceased to exist, and consequently "its membership in the United Nations has therefore expired."<sup>183</sup>

In the Fall of 1992, the Security Council instituted a number of measures that served as little more than lip-service to halting the Balkan atrocities. On October 6, the Security Council voted unanimously to establish a war-crimes commission to collect evidence of human rights violations within the former Yugoslav federation, and to decide which individuals should face prosecution.<sup>184</sup> Despite its apparent vehement intent to intervene and bring human rights violators to justice, the Security Council waited nearly a year to establish a tribunal to decide the cases of those that

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181. In Resolution 242 the General Assembly recognized Bosnia as an independent and sovereign nation under international law and stated:

*The General Assembly,*

...

*Reaffirming* the necessity of respecting the sovereignty, territorial integrity, political independence and national unity of the Republic of Bosnia and Herzegovina, and rejecting any attempt to change the boundaries of that Republic,

*Reaffirming* also the inherent right of the Republic of Bosnia and Herzegovina to individual or collective self-defence in accordance with Article 51 of the Charter,

...

1. *Demands* that all parties to the conflict immediately stop fighting and find a peaceful solution in line with the Charter of the United Nations and the principles of international law, in particular the principles of respect for sovereignty and territorial integrity of States, non-recognition of the fruits of aggression and non-recognition of the acquisition of territory by force;

2. *Demands* also that all forms of interference from outside the Republic of Bosnia and Herzegovina cease immediately;

3. *Demands* further that those units of the Yugoslav People's Army and elements of the Croatian Army now in Bosnia and Herzegovina must either be withdrawn, or be subject to the authority of the Government of Bosnia and Herzegovina, or be disbanded and disarmed with their weapons placed under effective international monitoring, and requests the Secretary-General to consider without delay what kind of international assistance could be provided in this connection;

4. *Reaffirms* its support for the Government and people of the Republic of Bosnia and Herzegovina in their just struggle to safeguard their sovereignty, political independence, territorial integrity and unity;

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G.A. Res. 242, U.N. GAOR, 46th Sess., Supp. No. 49A, at 6-7, U.N. Doc. 46/242 (1992) (emphasis in original).

182. G.A. Res. 1, U.N. GAOR, 47th Sess., Supp. No. 49, at 12, U.N. Doc. 47/1 (1992). See also *Despite Last-Minute Plea, U.N. Expels Yugoslavia*, CHI. TRIB., Sept. 23, 1992, at 1 [hereinafter *U.N. Expels Yugoslavia*].

183. *U.N. Expels Yugoslavia*, *supra* note 182.

184. S.C. Res. 771, U.N. SCOR, 47th Sess., 3106th mtg., at 25, U.N. Doc. S/RES/771 (1992).

the war-crimes commission should recommend for prosecution.<sup>185</sup>

On October 9, 1992, the U.N. took further steps to prevent Serbian aggression from disrupting the delivery of humanitarian relief supplies by imposing a "No-Fly" Zone over Bosnia.<sup>186</sup> The U.N., however, failed to provide additional forces to allow the U.N. Protection Force to enforce any future violation of the "No-Fly" Zone.<sup>187</sup> Furthermore, despite the strong rhetoric by both U.S. Ambassador Edward Perkins and Sir David Hannay, the British U.N. Ambassador,<sup>188</sup> reports of Serb violations abounded on two of the first four days after the resolution's adoption.<sup>189</sup> Serb violations prompted an immediate controversy among the allies about both the extent of a violation required to prompt enforcement measures, and the proper response to such a violation.<sup>190</sup>

As peace efforts stagnated, U.N. inspectors conducted investigations that contradicted prior inquiries and revealed that human rights violations in Bosnia had worsened.<sup>191</sup> Tadeusz Mazowiecki, official U.N. human rights investigator, noted the grave danger faced by Bosnia's Muslims and stated, "[e]thnic cleansing does not appear to be the consequence of the war but rather its goal."<sup>192</sup> A more chilling revelation came when he stated, "[t]his goal, to a large extent, has already been achieved through killings, beatings, rape, destruction of houses and threats."<sup>193</sup>

## 2. The Vance-Owen Peace Plan & U.S. Participation

In early February 1993, international mediators Cyrus Vance, representing the U.N., and Lord Owen, representing the E.C., proposed a plan to bring peace to the region. At renewed negotiations between Serbs, Croats, and Bosnians, the mediators proposed a plan that would allow Bosnia to

185. S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/RES/808 (1993). Paul Lewis, *U.N. Sets Up War-Crimes Panel on Charges of Balkan Atrocities*, N.Y. TIMES, Oct. 7, 1992, at A1. See also Franklin & Atlas, *supra* note 127.

186. S.C. Res. 781, U.N. SCOR, 47th Sess., 3122nd mtg., at 27, U.N. Doc. S/RES/781 (1992). See also "No-Fly" Zone Over Bosnia O.K.'d by U.N., L.A. TIMES, Oct. 10, 1992, at A8 [hereinafter "No-Fly" Zone O.K.'d].

187. S.C. Res. 781, *supra* note 186, at 27.

188. Perkins stated, "If . . . the current resolution is violated, my government will move to seek adoption by the council of a further resolution mandating enforcement of a no-fly zone over Bosnia-Herzegovina." "No-Fly" Zone O.K.'d, *supra* note 186, at A8. In addition, Hannay stated, "Anybody who thinks that they can flout this ban without being found out is going to be badly surprised. And anybody who thinks that, having been found out, no action will be taken, will also be badly surprised." *Id.*

189. Jackson Diehl & Barton Gillman, *Enforcement of Bosnia "No-Fly" Zone Weighed*, WASH. POST, Oct. 14, 1992, at A25. See also Lucia Mouat, *U.N. Weighs Credibility Risks of Enforcing Bosnian No-Fly Zone*, CHRISTIAN SCI. MONITOR, Jan. 15, 1993, at 1.

190. Diehl & Gillman, *supra* note 189. U.N. efforts to impose a naval blockade of Serbia have likewise proved ineffective. William Drozdiak, *NATO Agrees to Impose Blockade of Serbia*, WASH. POST, Nov. 19, 1992, at A31. Despite NATO's efforts to enforce a U.N. blockade of Serbia, the effort has failed to stem the flow of contraband into the region. *Id.* See also David H. Hackworth, *The Blockade Is a Joke*, NEWSWEEK, Oct. 12, 1992, at 46.

191. Meisler, *supra* note 124.

192. *Id.*

193. *Id.*

remain a sovereign nation, but would divide it into ten autonomous regions controlled by a loose central government.<sup>194</sup> The plan granted one minority control of each region, and all armed ethnic forces would retreat to a region governed by their ethnic minority.<sup>195</sup> In addition, the plan permitted the U.N. to monitor weapons movements to enforce the plan and to ensure freedom of movement for all ethnic groups in the area.<sup>196</sup> The plan also called for a strong central government mechanism to enforce human rights and reverse the results of ethnic cleansing.<sup>197</sup>

Despite the widespread international and European support for the plan, only the Croatian delegation fully accepted it.<sup>198</sup> Serbs objected to the plan because it required them to surrender approximately thirty-nine percent of the land they had captured in the course of the civil war.<sup>199</sup> A more strenuous objection arose from Bosnia's Muslim-led government, however, which claimed that the plan's provision for Serbs to control three of the autonomous provinces, covering forty-three percent of Bosnia's geographical territory, would condone Serbian aggression in the conflict and would constitute a "vot[e] for ethnic cleansing."<sup>200</sup> The Bosnian government further halted the negotiations by listing demands which the Serbs and Croats must meet prior to continuing peace plan discussions.<sup>201</sup> Bosnia required a halt to ethnic cleansing, arrangement for U.N. supervision of all heavy weapons, enforcement of the "No-Fly" Zone over Bosnia, and safe passage for relief convoys.<sup>202</sup>

Far from resolving the situation, the Vance-Owen peace plan exacerbated tensions in the region.<sup>203</sup> Reports of renewed ethnic cleansing by Serb gunmen surfaced after the announcement of the plan's details.<sup>204</sup> Witnesses claimed that Serb forces drove 5,000 Muslims from the Bosnian town of Tuzla, and another 4,000 from the town of Trebinje.<sup>205</sup> The Serb aggression seemed to be aimed at gaining control of the road linking the Bosnian town of Zvornik with Serbian-held areas around Sarajevo.<sup>206</sup> The fact that under the Vance-Owen peace plan Muslims would control these regions led the Bosnian government to accuse Serbs of attempting to frus-

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194. Paul Lewis, *Bosnia Mediators Urging U.S. to Join Peace Force*, N.Y. TIMES, Feb. 5, 1993, at A8.

195. *Id.*

196. *Id.*

197. *Id.*

198. Paul Lewis, *Bosnia Peace Talks Yield No Progress*, N.Y. TIMES, Feb. 8, 1993, at A10.

199. *Id.*

200. Chuck Sudetic, *Bosnia Peace Plan Said to Spur New Attacks by Serbs*, N.Y. TIMES, Feb. 8, 1993, at A10. David Owen contends, however, that the plan does not reward Serbian aggression, because: "The rural Bosnian Serbs sat on over 60 percent of the country before the war, and we are offering them three provinces covering 43 percent." *The Future of the Balkans; An Interview with David Owen*, 72 FOREIGN AFF. 1 (Spring 1993).

201. Lewis, *supra* note 198.

202. *Id.*

203. Sudetic, *supra* note 200; Lewis, *supra* note 198.

204. Sudetic, *supra* note 200.

205. *Id.*

206. *Id.*

trate the peace talks by consolidating their power in the region.<sup>207</sup>

In February 1993, the incoming Clinton administration further stymied the peace negotiations by announcing that it would not support the Vance-Owen peace plan.<sup>208</sup> Bosnia's Muslims responded to the announcement by halting any further discussion of the Vance-Owen plan, hoping that the Clinton administration would propose a plan that would prove more favorable to the Muslim population.<sup>209</sup> Responding to pressures from other U.N. members, the Clinton administration quickly reversed its position on the Vance-Owen peace plan<sup>210</sup> and declared that it would intervene to hasten a peaceful resolution to the crisis.<sup>211</sup> The administration also announced its support for heavier sanctions against Serbia and the creation of an international war crimes court.<sup>212</sup>

By early March, in response to both frustrations with all parties to the negotiations and the extent of suffering by Bosnia's civilian population, the Clinton administration undertook an extensive effort to air-drop relief supplies to isolated regions in Bosnia.<sup>213</sup> While the administration claimed that it intended to benefit suffering members of all parties,<sup>214</sup> it clearly aimed its efforts at reaching Bosnia's Muslim population which Serbian forces had isolated.<sup>215</sup> Administration officials claimed that the effort proved successful in improving the plight of starving civilians.<sup>216</sup> Critics, however, argued that not only did the air-drops prove inaccurate, and thus ineffective in reaching isolated regions,<sup>217</sup> but the aid drew Bosnia's Muslim troops away from their positions and enabled Serb rebels to increase their offensive efforts and take positions not previously held.<sup>218</sup> Reports indicated that the towns of Tuzla<sup>219</sup> and Cerska<sup>220</sup> fell as a result

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207. *Id.*

208. Elaine Sciolino, *U.S. Declines to Back Peace Plan as the Balkan Talks Shift to U.N.*, N.Y. TIMES, Feb. 2, 1993, at A8; Elaine Sciolino, *U.S. Faces a Delicate Task in Intervening in Negotiations on Bosnia*, N.Y. TIMES, Feb. 12, 1993, at A10 [hereinafter *U.S. Faces Delicate Task*].

209. John F. Burns, *Bigger U.S. Peace Role Leaves Bosnians Split*, N.Y. TIMES, Feb. 12, 1993, at A10.

210. Elaine Sciolino, *U.S. Backs Bosnian Peace Plan; Serbs May Keep Occupied Land*, N.Y. TIMES, Feb. 11, 1993, at A1.

211. *U.S. Faces Delicate Task*, *supra* note 208.

212. *Id.*

213. Stephen Kinzer, *U.S. Planes Begin Effort to Airdrop Aid to Bosnia*, N.Y. TIMES, Mar. 1, 1993, at A1. Although United Nations forces had been present in the region attempting to deliver humanitarian aid, they limited these attempts to ground convoys which relied upon the permission of Serb rebels to travel to areas in need of relief supplies.

*Id.*

214. Stephen Kinzer, *Much Bosnian Aid Missed its Target*, N.Y. TIMES, Mar. 2, 1993, at A1, A9.

215. Thomas L. Friedman, *Airdrop Proposal Gets Endorsement of the U.N. Chief*, N.Y. TIMES, Feb. 24, 1993, at A1.

216. Kinzer, *supra* note 214, at A9.

217. *Id.* See also Friedman, *supra* note 215, at A8; Michael R. Gordon, *U.S. Aircraft Will Drop Cargo at High Altitude*, N.Y. TIMES, Feb. 24, 1993, at A8.

218. Chuck Sudetic, *Bosnian Muslims Fleeing Villages Under Shellfire*, N.Y. TIMES, Mar. 4, 1993, at A1.

219. *Id.*

of diminished defenses brought about by the inaccurate administration of aid. In addition, critics contended that the air-drops put French and British troops on the ground in Bosnia at risk of Serbian retaliation.<sup>221</sup>

By early July 1993, the parties had moved in such disparate directions that many observers considered the Vance-Owen peace plan "dead."<sup>222</sup> Negotiations continued through the summer, with both the adverse parties and the international mediators leaning upon Bosnia's Muslim population in an effort to bring peace to the region.<sup>223</sup> Whether these efforts will bring a halt to the fighting remains unclear. The U.N., however, has not yet taken meaningful action to prevent the spread of ethnic cleansing.

## B. Political Shortcomings

The U.N.'s failure to take steps to prevent ethnic cleansing rests not on any structural flaws in the international legal system, but upon political disputes. Whether viewed as an international or domestic conflict, the current body of international law offers an adequate means to address the egregious human rights violations occurring daily in Bosnia. What the current structure cannot address, however, is the difference in political will.

From the outset, the U.N. and most outside observers have viewed the conflict in the Balkans as a "threat to international peace and security."<sup>224</sup> Upon these grounds, the Security Council first acted to impose an arms embargo<sup>225</sup> and strict economic sanctions upon the region.<sup>226</sup> The General Assembly has also characterized the dispute as one of "international" character, with the interests of sovereign nations at stake.<sup>227</sup> Enforcement of the U.N. Charter would insulate the newly-formed governments from foreign intervention, thereby effectively protecting each regions' ability to establish their own political structure. This would render Serbia's attempts to supply Serbian rebels within Bosnia and Croatia clear violations of the U.N. Charter,<sup>228</sup> which obliges members to show "respect for the principle of equal rights and self-determination of peoples."<sup>229</sup>

220. John F. Burns, *Enclave in Bosnia Reported to Fall After U.S. Airdrop*, N.Y. TIMES, Mar. 3, 1993, at A1.

221. John F. Burns, *U.N. Officials Warn on Bosnia Airdrop*, N.Y. TIMES, Feb. 23, 1993, at A8.

222. Daniel Williams, *Three-Way Partition of Bosnia; Realities of War Come to Fore; Vance-Owen Plan of Multiethnic Makeup Seems to Evaporate*, WASH. POST, June 19, 1993, at A12; Kim Murphy, *Vance-Owen Plan Victim of Talks on Bosnia*, L.A. TIMES, June 18, 1993, at A1.

223. Peter Maass, *Bosnia Rejects Pressure for Partitioning; Opponents, Mediators Lean on Muslim Leader*, WASH. POST, Sept. 1, 1993, at A25; Paul Lewis, *Bosnian Leader Resists Pressure to Negotiate on Partition Plan*, N.Y. TIMES, June 26, 1993, at A5.

224. See S.C. Res. 713, *supra* note 160, at 3. See also S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., Doc. No. S/RES/827 (1993); S.C. Res. 819, U.N. SCOR, 48th Sess., 3199th mtg., Doc. No. S/RES/819 (1993); S.C. Res. 808, *supra* note 185; G.A. Res. 242, *supra* note 181, at 6.

225. S.C. Res. 713, *supra* note 160, at 3.

226. S.C. Res. 757, *supra* note 177, at 13.

227. G.A. Res. 242, *supra* note 181, at 6.

228. See *supra* notes 67-68 and accompanying text.

229. U.N. CHARTER art. 1, ¶ 2.

The U.N. could combat human rights violations subjecting the Balkan states to the traditional policies exercised by the General Assembly and the Security Council. Both of these bodies have consistently held that, because of the human rights obligations of member nations under Article 1(3) and Article 55 of the Charter, any human rights violation after membership no longer constitutes a "domestic" issue, but instead takes on an international character.<sup>230</sup> Therefore, any remedial action taken by U.N. authorities cannot violate the Article 2(7) prohibition on intervention.<sup>231</sup> Should the U.N. muster the political willpower,<sup>232</sup> ample legal foundation clearly exists to warrant sending U.N. troops to the region to remove both Croatian and Serbian troops from their strongholds in Bosnia.<sup>233</sup>

The conflict within Bosnia, between the Muslim population and the Bosnian Serbs, requires a slightly different analysis. Bosnian Serbs have proclaimed their right of self-determination within the nation of Bosnia.<sup>234</sup> As a means to achieve this end, and aided to a great extent by Serbia itself,<sup>235</sup> the Bosnian Serbs have undertaken an armed uprising

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230. Delbrück, *supra* note 8, at 893.

231. *Id.*

232. While the U.N. has established an arms embargo in the region, it must coordinate steps to insure enforcement. See *supra* notes 160-164, and accompanying text. Recent reports indicate that intelligence forces have detected Serbian attempts to violate not only the embargo imposed upon the Balkan region, but also the arms embargo imposed upon Somalia. Michael R. Gordon, *U.S. Believes Greek Ship Is Carrying Serbian Arms to Somalia*, N.Y. TIMES, Feb. 23, 1993, at A6 [hereinafter *Greek Ship Carrying Serbian Arms*]. See also Michael R. Gordon, *In Test of Serbian Embargo, U.S. Presses to Seize a Ship*, N.Y. TIMES, Feb. 26, 1993, at A8. Reports accuse Serbs of orchestrating a complex scheme to sell Serbian weapons—a large stockpile of which was inherited from the Yugoslav National Army—in exchange for cash to illegally purchase goods badly needed in Serbia. *Greek Ship Carrying Serbian Arms, supra*. See also Craig R. Whitney, *U.N. Boycott Has Belgrade Angry at U.S.*, N.Y. TIMES, Mar. 4, 1993, at A4. A detailed report by American officials alleges that Serbs shipped arms, on a ship sailing under a Greek flag, to Kenya where the Kenyans would smuggle the arms across the border into Somalia. *Greek Ship Carrying Serbian Arms, supra*. However, after apparently learning of the fate that awaited them in Kenya, the ship changed to a Honduran flag and set course for Singapore. *Id.*

The United States leads the effort to capture ships accused of illegally delivering goods to the former Yugoslavia by urging allies to detain suspected vessels. *Id.* However, despite U.S. efforts to put "teeth" in the embargo, coordination has not been forthcoming. *Id.* Italian warships seized the *Dimitrakis*, after its alleged January 19, 1993 violation in the Montenegrin port of Bar, after it left port. *Id.* However, when a local Italian magistrate decided that the *Dimitrakis'* papers met with his satisfaction, he released the ship. *Id.* Washington has requested that other nations seize the ship wherever it comes to port, seeking to bring the matter before the U.N. Sanctions Committee, but whether or not such efforts will prove fruitful remains unclear. *Id.*

Such slipshod efforts clearly prove inadequate. After-the-fact enforcement of a blockade seems woefully insufficient to deter smugglers who seem willing to risk the slight chance of detection in return for the large profits gained from contraband sales. To isolate the region, the U.N. must establish an enforcement mechanism that will halt violations before they occur and quickly punish those caught violating U.N. mandates.

233. The characterization of the dispute as a "threat to international peace and security" opens the door to enforcement procedures under Chapter VII of the U.N. Charter, including the use of force. See *supra* notes 42-46 and accompanying text.

234. Weller, *supra* note 71, at 597.

235. See *supra* note 123 and accompanying text.



against their elected government.<sup>236</sup> An integral part of this campaign is the practice of ethnic cleansing.<sup>237</sup> Although this internal conflict must be viewed as a kind of civil war,<sup>238</sup> the United Nations has characterized ethnic cleansing as a threat to international peace and security.<sup>239</sup> Clearly, any steps to remedy this would be grounded in international law.<sup>240</sup> The prohibition against requiring member states to subject "domestic" issues to resolution by the U.N. is subject to enforcement measures under Chapter VII of the U.N. Charter.<sup>241</sup>

#### IV. New Solutions

##### A. A "Humanitarian" Interpretation of the U.N. Charter

The modern international community must forge new legal doctrines to remedy the unique problems it faces.<sup>242</sup> Never before have so many peoples sought to embrace the "fundamental" rights of self-determination and democracy.<sup>243</sup> As our modern conceptions of "justice" evolve, so too must our interpretations of those documents that govern international relations.

One would be hard pressed to find a modern advocate of "sovereignty" who would claim that the doctrine applies—in terms of international relations—to the "establishment" of an unjust political leader.<sup>244</sup> Such a principle lies at the foundation of the international right of self-defense—a leader cannot acquire legitimate control of another state merely by seizing it.<sup>245</sup> So too should our concepts of "sovereignty" in the domestic arena evolve to stand for "popular sovereignty."<sup>246</sup> Such an interpretation would not prevent intervention under the U.N. Charter to redress human rights violations when the polity's ability to determine their own form of governance is not threatened.<sup>247</sup> Widespread and persistent

236. See *supra* note 122 and accompanying text.

237. See *Further Report by Secretary-General*, *supra* note 128, ¶ 5.

238. For a comprehensive analysis of the Yugoslavian Civil War and its international ramifications, see Charles Lewis Nier III, *The Yugoslavian Civil War: An Analysis of the Applicability of the Laws of War Governing Non-International Armed Conflicts in the Modern World*, 10 DICK. J. INT'L L. 303 (1992).

239. S.C. Res. 819, *supra* note 224; S.C. Res. 827, *supra* note 224.

240. See *supra* notes 42-46 and accompanying text.

241. See *supra* notes 36-41 and accompanying text.

242. See, e.g., Boutros Boutros-Ghali, *U.N. Balancing World Needs vs. Separate State*, SACRAMENTO BEE, Aug. 28, 1993 (describing the importance of multilateralism to preserve the "international state system" and defend "legitimate" minority rights in the post-cold-war era).

243. *Id.*

244. See *supra* note 64-65 and accompanying text.

245. U.N. CHARTER art. 51.

246. Many critics urge that accepted theories of governance have already evolved to this state. See, e.g., Boutros-Ghali, *supra* note 242; Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992).

247. Scholars have argued that the present narrow view of humanitarian intervention—breaching a state's territorial integrity for the limited purpose of rescuing one's nationals—does not constitute the only possible alternative under current international law. See, e.g., Nanda, *supra* note 33, at 310; Delbrück, *supra* note 7, at 891-94. See *gener-*

human rights violations within a society indicate a breakdown in the political structure and an internal social crisis. Hence, humanitarian intervention should not be viewed as an affront to sovereignty, but as a necessary tool to preserve it.

In addition, the prohibitions against intervention in "domestic" affairs must also be reinterpreted to conform to modern notions of "human rights."<sup>248</sup> As with the doctrine of "sovereignty," international law must evolve to view all peoples, both collectively and individually, as possessing fundamental human rights which are not subject to the sole jurisdiction of the individual state.<sup>249</sup> For states that are members of the U.N., authority for viewing human rights issues as domestic issues can be found in the U.N. Charter and other international documents that bind the international community. For states that have not been admitted to the U.N., justification for protecting these rights arises from that pre-Charter body of international law that is resurrected by our reinterpretation of the Charter's mandates.<sup>250</sup>

The U.N. Charter is replete with references and commitments to protecting "fundamental human rights."<sup>251</sup> While conceding this point, many critics contend that Article 2(7) forbids U.N. intervention in domestic matters that do not pose a threat to "international peace and security" under Chapter VII, and that human rights violations fall within the aegis

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ally Michael Bazylar, *Reexamining the Doctrine of Humanitarian Intervention in Light of the Atrocities in Kampuchea and Ethiopia*, 23 STAN. J. INT'L L. 547 (1987); Captain Thomas E. Behuniak, *The Law of the Unilateral Humanitarian Intervention by Armed Force: A Legal Survey*, 79 MIL. L. REV. 157 (1978); Ian Brownlie, *Humanitarian Intervention*, in LAW AND THE CIVIL WAR IN THE MODERN WORLD 217 (John Norton Moore ed., 1974); Felix Ermacora, *Commentary on Article 2(7) no. 10 and no. 12*, in DIE CHARTA DER VEREINTEN NATIONEN—KOMMENTAR 106-10 (B. Simma ed., 1991); Tom J. Farer, *Human Rights in Lao's Empire: The Jurisprudence of War*, 85 AM. J. INT'L L. 117 (1991); H. Scott Farley, *State Actors, Humanitarian Intervention and International Law: Reopening Pandora's Box*, 10 GA. J. INT'L & COMP. L. 29 (1980); Jean-Pierre L. Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity under the U.N. Charter*, 4 CALIF. W. INT'L L.J. 203 (1974); HUMANITARIAN INTERVENTION AND THE UNITED NATIONS (Richard B. Lillich ed., 1973); James A.R. Nafziger, *Self-Determination and Humanitarian Intervention in a Community of Power*, 20 DENV. J. INT'L L. & POL'Y 9 (1991); Ved P. Nanda, *Humanitarian Military Intervention*, WORLD VIEW, Oct. 1978, at 23; Kevin Ryan, *Rights, Intervention and Self-Determination*, 20 DENV. J. INT'L L. & POL'Y 55 (1991); Eisuke Suzuki, *A State's Provisional Competence to Protect Human Rights in a Foreign State*, 15 TEXAS INT'L L.J. 231 (1980); MICHAEL WALZER, JUST AND UNJUST WARS 107-08 (1977). By viewing "sovereignty" as "popular sovereignty," foreign states would be justified in intervening to protect a foreign populace when its "sovereignty" is being violated. See *supra* note 64.

248. It seems axiomatic that any construction of "fundamental human rights" must include the protection against systematic extermination. While significant debate exists as to the breadth of "fundamental human rights," such debate seems irrelevant for purposes of this discussion. Few would argue that genocide and "ethnic cleansing" fall within a questionable penumbra of "fundamental human rights." Indeed for the term to have any significance, protection against genocide and similar evils must lie at its core.

249. Arguably, international law prior to the U.N. Charter recognized that individuals possessed rights which individual states could not violate. See *supra* note 49 and accompanying text.

250. See *supra* section I.C.1.

251. See generally U.N. CHARTER pmbl; arts. 1; 2; 13(1)(b); 55(c); 56; 62(2); 76(c).

of domestic jurisdiction. Nothing in the Charter classifies "human rights" as a domestic issue. A careful reading of the Charter reveals a document that may be interpreted to consider egregious human rights violations as beyond the "domestic" jurisdiction of a state.

The preamble to the Charter recites its commitment to "the dignity and worth of the human person" and the promotion of "social progress and better standards of life."<sup>252</sup> Article I moves a step further and declares the U.N.'s dedication to "achiev[ing] international cooperation in solving *international* problems of [a] . . . *humanitarian* character, and in promoting and encouraging respect for *human rights*."<sup>253</sup> Such a reference appears to contemplate human rights violations that fall beyond the realm of domestic jurisdiction and under the purview of international bodies. While the Charter does not specify what these "international human rights" violations might be, logic suggests that internalized conflicts must fall into this category. Without such an interpretation, the independent goal has no substantive meaning because international conflicts are covered elsewhere.

Careful reading of Article 2 of the Charter further supports this analysis. The power granted to the Security Council under Chapter VII must extend beyond conventional conceptions of "international peace and security."<sup>254</sup> Unless one envisions international threats to peace that do not constitute international acts of aggression, the exception to the principle of nonintervention, as stated in Article 2(7),<sup>255</sup> has no substantive meaning.<sup>256</sup> Defining threats to "international peace and security" exclusively in terms of international acts of aggression would not require an exception under Article 2(7), because by definition the Act would not fall within the "domestic jurisdiction" of the acting state.<sup>257</sup>

Additionally, to protect human rights adequately, the U.N. must take new steps to define the scope of necessity and proportionality in humanitarian intervention. Interpreting the principles of nonintervention and self-determination in a manner consistent with upholding fundamental human rights would serve as a starting point.<sup>258</sup> As Professor Fernando

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252. U.N. CHARTER pmbl.

253. *Id.* art. 1, ¶ 3 (emphasis added).

254. Delbrück, *supra* note 7, at 897.

255. *See supra* note 54.

256. Delbrück, *supra* note 7, at 897.

257. *Id.* Many resolute critics argue that even if human rights violations constitute an international concern, Article 24 only gives the Security Council power to maintain "international peace and security," U.N. CHARTER art. 24, ¶ 1, and as long as the dispute remains internalized, the Security Council cannot intervene. Such a reading of the powers granted to the Security Council fails to recognize the guidelines that Article 24 provides to determine the appropriate course of action: "In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations." *Id.* Because the Security Council must determine what constitutes a "threat to the peace, breach of the peace, or act of aggression," *id.* art. 39, in reaching such a conclusion it must necessarily consider whether a situation constitutes an "international problem of . . . [a] *humanitarian* character," *id.* art. 1, ¶ 3 (emphasis added), or threatens "universal respect for . . . *human rights*." *Id.* art. 55, ¶ c (emphasis added).

258. TESÓN, *supra* note 42, at 200.

Tesón argues, determining the extent of legal humanitarian intervention involves the balancing of the various competing principles (i.e., fundamental human rights, nonintervention, and self-determination) rather than choosing one alternative without consideration of the others.<sup>259</sup> Professor Ved Nanda suggests some criterion that might simplify this evaluation:

(1) . . . the proper interpretation of Article 2(4) [of the U.N. Charter] would be to proscribe the use of force when it is directed at sovereignty, territorial integrity, or political independence of a state . . . ; (2) . . . humanitarian intervention, by definition, does not seek to challenge these attributes . . . ; [and] (3) . . . the promotion and protection of human rights . . . constitut[e] an important obligation under the United Nations Charter.<sup>260</sup>

By establishing these limitations on the use of humanitarian intervention, the international community can protect the goal of preserving fundamental human rights while preserving the integrity of the principles of nonintervention and self-determination.

Above all else, our modern notions of international law must be informed by our notions of political "sovereignty" and "domestic" affairs. Obligations and restrictions under the U.N. Charter and other legal instruments must be interpreted *pari materia* with the proposed duties and principles contained therein. The international community's interest in protecting such doctrines is too important to be bound by outdated doctrines of "plain language."<sup>261</sup>

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259. *Id.*

260. Nanda, *supra* note 33, at 310 (footnote omitted).

261. Some have argued that the establishment of a private cause of action for the victims serves as the best way to provide a meaningful remedy for human rights. *See, e.g.,* Frank C. Newman, *Redress for Gulf War Violations of Human Rights*, 20 DENV. J. INT'L L. & POL'Y 213, 216 (1992) (arguing that "[m]ost people whose international human rights have been violated will be aided more by non-criminal than by criminal sanctions."). In this vein, the Center for Constitutional Rights, the International League for Human Rights and the International Women's Human Rights Clinic of the City University of New York's Law School have filed a class-action lawsuit against Radovan Karadzic, the Bosnian Serb leader, on behalf of the numerous women and men "who suffered rape, summary execution, other torture or other cruel, inhuman and degrading treatment inflicted by Bosnian Serb forces under the command and control of the defendant [Karadzic]." Niel A. Lewis, *New Talks on Bosnia Set to Begin Monday at U.N.*, N.Y. TIMES, Feb. 27, 1993, at 5. The action was brought under the Torture Victim Protection Act of 1991 (28 U.S.C. § 1350). *Id.* The Torture Victim Protection Act allows plaintiffs to bring civil claims against a foreigner for acts committed outside the United States if the foreigner is within the jurisdiction of an American court. *See generally* 28 U.S.C. § 1350. Although this measure seems unlikely to secure any relief for the victims, primarily because the courts cannot force the appearance of the defendant and because he has no sizeable assets in the country, it presents a strong statement by both the plaintiffs and the U.S. courts that these alleged human rights violations merit serious attention. Lewis, *supra*, at 5.

Some critics have argued that permitting such claims hinders the ability of U.N. negotiators to reach a peaceful resolution. *Id.* *See also* Lewis, *supra*. However, granting immunity to an alleged criminal would be more than a symbolic betrayal of human rights principles, and the United States has taken the proper course by permitting the suit and denying Dr. Karadzic's request for immunity.

### B. Unilateral Third Party Intervention

As the international community embraces visions of "sovereignty" that emphasize the concept of popular sovereignty and public choice, the traditional reasons for prohibiting third party unilateral intervention vanish. A traditional reason for preventing unilateral intervention was that it would be widely abused; nations would intervene for territorial rather than humanitarian reasons.<sup>262</sup> The modern system of global communication facilitates confirmation of such goals obviating the need for such a prohibition.<sup>263</sup> Furthermore, should such an abuse occur, the international community has quite convincingly demonstrated its ability to remedy such violations.<sup>264</sup>

Additionally, as the concept of "popular sovereignty" spreads and becomes the international norm, the ability to act unilaterally will help remove the political impediments that have prevented effective assistance of the crisis in Bosnia.<sup>265</sup> Questions of the proper scope and means to address egregious human rights violations will devolve into political questions. Those states whose populace feels that the costs of aiding innocent human rights victims do not outweigh the benefits will be free to make that choice.<sup>266</sup> The extensive administrative bodies of the United Nations can serve as a means to coordinate aid efforts. Additionally, the international community, through the U.N., can adopt procedures to prevent needless confusion and wasting of effort. Above all else, the international community should seek to end the ban in unilateral humanitarian intervention, because when the international community founds its institutions

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262. See *supra* note 52 and accompanying text.

263. The use of such modern technology as "spy" satellites and other global telecommunications media can confirm or refute specific allegations of many events occurring on the other side of the world. See, e.g., Steven V. Roberts et al., *New Diplomacy by Fax Americana*, U.S. NEWS & WORLD REP., June 19, 1989, at 32.

264. One recent example is the Persian Gulf War, which, due to its unprecedented display of international cooperation, has sparked a controversy concerning the "legality" of such multilateral efforts. See John Quigley, *The United States and the United Nations in the Persian Gulf War: New Order or Disorder?*, 25 CORNELL INT'L L.J. 1 (1992).

265. See *supra* section III.B.

266. As reports of ethnic cleansing have multiplied, and evidence of atrocities has grown, many members of the international community have expressed their frustration over the U.N.'s apparent lack of concern for Bosnia's Muslim population. Recent reports reveal sources of outside intervention. Public outrage in much of Europe, especially France, reflects the public opinion that authorities must take steps to prevent further "ethnic cleansing." A recent poll in France revealed that 68% of French voters openly advocate military intervention. William Drozdiak, *France Weighs Direct Bosnia Intervention*, Hous. CHRON., Dec. 27, 1992, at A24. A recent bipartisan appeal by French Socialists and opposition Conservatives to President François Mitterand indicates the impact of this outcry upon public officials. The bipartisan appeal urged Mitterand to issue an ultimatum to Serb leaders to halt ethnic cleansing and give up their siege of Sarajevo and other Bosnian cities. *Id.* The proposed ultimatum would carry the threat of direct military intervention if Serbs do not abide by it. *Id.* A recent statement by French Foreign Minister Roland Dumas—stating that the U.N. must quickly act "to take all necessary steps to liberate the detention camps"—indicates France's resolute position on the issue. *Id.*

See also *Six Islamic Nations Offer Bosnia Force*, CHI. TRIB., July 14, 1993, at 10.

on the notion of "popular sovereignty," such a ban only impedes the protection of human rights.

### **Conclusion**

In order to protect minorities from systematic extermination, the international community must establish the legal foundation for allowing nations with the political will to intervene militarily in disputes that do not meet the conventional definition of "international aggression." As the desire for self-determination spreads across the globe, international law can protect this valid interest by permitting humanitarian intervention only when necessary to protect human rights. As the situation in Bosnia demonstrates, failure to interpret international instruments according to our modern understanding of "sovereignty" and "self-determination" reduces internal conflicts threatening fundamental human rights to political debates within the U.N. International law should encourage, rather than limit, the international protection of human rights by establishing mechanisms that lead to action rather than rhetoric.

